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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 293

MRS. M. B. BUFORD ET AL.,
Petitioners,

vs.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN.

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vided that suit should be filed within two years from the date of the act, 1951) barred petitioners' suit, because there is no federal statute authorizing such reimbursement; the federal act providing for reimbursement of state claims (Ch. 241, Sec. 1 of the Acts of the 47th Congress, approved June 27, 1882, 22 U. S. Stats. at Large, p. 111) did not apply to claims from Texas, arising after October 20, 1865, by its terms, and said Article 842g therefore did not apply to petitioners' bonds 33

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Mrs. M. B. Buford, joined *pro forma* by her husband M. B. Buford, and George B. Lindler, Administrator of the Estate of Jeff Chapman, deceased, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, the Supreme Court of Texas having denied petitioners' application for writ of error on May 20, 1959, and overruled petitioners' motion for rehearing on June 24, 1959, thereby finally refusing to review the judgments of the Court of Civil Appeals and the District Court.

OPINIONS BELOW.

The opinions of the Chief Justice of the Court of Civil Appeals and the concurring opinions of the Associate Justices of that court are set forth in the appendix to this petition and are reported in cause styled *Mrs. M. B. Buford et al.* v. *The State of Texas*, 322 S.W.2d 366.

JURISDICTION.

The judgment of said Court of Civil Appeals was entered on January 28, 1959, and motion for rehearing was denied by that court on March 4, 1959. Petitioners' application for writ of error to the Supreme Court of Texas was denied by that court on May 20, 1959, and the motion for rehearing filed in that court was overruled June 24, 1959. The jurisdiction of this court is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED.

(1) Whether the rejection of the proposed Fourteenth Amendment to the U. S. Constitution by more than one-fourth of the then existing states, killed the amendment so that the Congress was required to again propose same in accordance with Article V of the U. S. Constitution, before it could be lawfully ratified.

(2) Whether the U. S. Congress lawfully proposed the 14th Amendment to the U. S. Constitution when eleven of the then existing thirty-seven states were denied representation in the U. S. Senate in violation of that provision of Article V of the U. S. Constitution which specifi-

cally states that no state, without its consent, shall be deprived of its equal suffrage in the senate.

(3) Whether the change of a certified rejection to a ratification by the legislatures of the southern states, that is Texas, North Carolina, Arkansas, South Carolina, Virginia, Mississippi, Louisiana, Florida, Georgia and Alabama, which change was brought about by force, threats, fraud and the use of federal troops was sufficient to ratify the Fourteenth Amendment when it was likewise conclusively rejected by Kentucky, Delaware and Maryland who never adopted same; California did not act on the amendment and the legislatures of New Jersey and Ohio withdrew their consent to same before Congress adopted the resolution declaring that it had passed. The resolution of Congress declaring the amendment adopted was untrue according to the record.

(4) Whether the Texas Ordinances of 1866 and Section 34, Article XII of the 1869 Texas Constitution, which attempted to invalidate debts of Texas created between January 28, 1861 and August 5, 1865, violated Section 10, Article I of the U. S. Constitution, prohibiting the enactment of any law impairing the obligation of a contract; a similar question is presented with reference to the Texas acts of November 6, 1866 and May 2, 1871, which created Auditorial Boards designed to adjust and refund the state debt by the issuance of new bonds with different maturities and lower rates of interest which violated said Section 10, Article I of the U. S. Constitution, particularly where said Auditorial Boards refused to consider the bonds involved merely because they were issued during the war years.

(5) Whether the acts of the 47th Congress, Chapter 41, Session 1, approved June 27, 1882, Vol. 22, U. S. Statutes

at Large, p. 111, authorized or directed any reimbursement to the State of Texas by the federal government on account of the bonds here involved or whether that act specifically prohibited reimbursement by the federal government of any claims from Texas arising before October 20, 1865. If the state received no reimbursement and was not entitled thereto then Article 842g, V.A.C.S., which authorized suit by all Texian Bond Issue holders against the state to the extent that such bonds had been reimbursed to the state by the federal government did not apply to this suit and said Article 842g could not bar petitioners from any relief. Consequently the construction of said federal act is here involved.

(6) Whether petitioners' suit is barred by laches and limitation and whether the legislature had the right to waive the defense of limitation and extend the period within which suit could be filed in view of the uncertainties and ambiguities in Article 842g, V.A.C.S.

(7) Whether petitioners were required to plead when and under what circumstances Jeff Chapman acquired the bonds involved although said bonds are bearer bonds and are negotiable instruments and are negotiable by delivery according to their terms.

U. S. CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED.

Sections 1 and 4 of the Fourteenth Amendment to the U. S. Constitution prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws and forbidding the payment by any state of any debt or obligation incurred in aid of the rebellion against the United States. The validity of the proposal of the 14th

Amendment and its ratification are challenged. Petitioners allege it was never lawfully proposed and never lawfully adopted.

Article V of the U. S. Constitution.

Section 10, Article I of the U. S. Constitution, prohibiting a state from impairing the obligation of contracts by law.

The construction of an Act of the 47th Congress, Chapter 41, Session 1, approved June 27, 1882, Vol. 22, U. S. Statutes at Large, p. 111, with reference to the reimbursement by the federal government of certain obligations of the states.

STATEMENT OF THE CASE.

Petitioners filed this suit in the 98th Judicial District Court of Travis County, Texas, to recover judgment on forty-six (46) Texian Loan bearer bonds issued by the State of Texas under an act of the Eighth Texas Legislature, approved April 8th, 1861. These bonds are each in the principal amount of $1,000.00 payable to bearer, July 1, 1877, at New Orleans, Louisiana, with interest at the rate of 8% per annum from July 1, 1862. Interest coupons payable every six months next following the date of the bonds are attached to same, except the first five coupons which have been clipped, that is, the coupons accruing in 1863, 1864 and January 1, 1865. All of the bonds are dated January 1, 1862, excepting Bond #5 which is dated March 25, 1862. With that exception all of the bonds are identical in form and substance. A copy of a typical bond is attached to plaintiffs' original petition as an exhibit.

Permission to sue the state on these bonds was authorized by House Concurrent Resolution No. 44, passed by

the 55th Legislature of Texas, Regular Session 1957, approved by the Governor June 11, 1957, and filed with the Secretary of State June 12, 1957. This suit was filed July 31, 1957, well within the two year period within which suit could be filed. The resolution limited the recovery against the state, however, on said bonds to the principal amount thereof with interest to the date of maturity of the bonds only, that is to July 1, 1877. Petitioners therefore sued only for the principal amount of said bonds plus interest through July 1, 1877.

The state answered first with a plea to the jurisdiction alleging that Resolution No. 44 authorizing petitioners to bring their suit was a violation of Section 1 of the XIVth Amendment to the Federal Constitution providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In said plea to the jurisdiction and again in its answer the state urged that petitioners' suit was barred by Article 842g which was enacted in 1951 by the 52nd Texas Legislature which authorized suit by the holders of Texian bonds to the extent that such bonds had been reimbursed to the state by the federal government. The State of Texas likewise pled in its answer that the bonds had been issued for the purpose of financing the rebellion against the United States and consequently that same were void under Section 4 of the XIVth Amendment which prohibits any state from assuming or paying any debt or obligation incurred in aid of the insurrection or rebellion.

The state also alleged in its answer that the bonds violated Ordinance No. 2 adopted by the Texas Constitutional Convention of 1866 forbidding the payment of any debts contracted or incurred by the State of Texas from the 28th day of January, 1861 until the 5th day of August,

1865, and along the same lines the state pled that the bonds were invalid under Ordinance No. 9 passed by the same convention in 1866 which provided that the war debt of Texas was void; that the bonds were null and void because of Section 34, Article XII of the 1869 Constitution of Texas which provided that all debts created by the state from and after the 28th day of January, 1861 and prior to the 5th day of August, 1865, were null and void and that said bonds were likewise invalid by virtue of two auditorial or refunding acts approved November 6, 1866 and May 2, 1871, which provided for Auditorial Boards whose duty it was to examine and allow all claims for money by individuals against the state and also provided for the issuance of refunding bonds in lieu of the approved debts of the state and the state also pled laches and limitation.

In its supplemental petition filed in reply to respondent's answer petitioners denied the state's allegations and excepted to the state's answer because on its face Concurrent Resolution No. 44 could not possibly violate the Fourteenth Amendment and that said Ordinances Nos. 2 and 9 adopted in 1866 by the Constitutional Convention were in violation of Section 10, Article I of the U. S. Constitution, inasmuch as said ordinances arbitrarily invalidated all debts incurred by the state during the war years, irrespective of the use of the money. Similar exceptions were urged by the petitioners with reference to said Section 34, Article XII of the 1869 Constitution of Texas and with reference to the refunding or auditorial board acts of 1866 and 1871, namely that said statutes violated Section 10, Article I of the U. S. Constitution.

In their supplemental petition petitioners specifically pled that the Fourteenth Amendment of the U. S. Constitution was never lawfully adopted by the people of the United States in accordance with Article V of that con-

stitution, that the subsequent change of rejection to ratification by the southern states was accomplished by force, threats and fraud as a result of military occupation of those states, that the military government had the complete legislative power, not the legislatures of said states, and that the conventions held by the State of Texas during the war years were mere carpet bag conventions elected by a minority of the voters in Texas because a majority of the voters were disfranchised, being participants in the war in behalf of the Confederacy.

In the judgment of the District Court, the state's plea to the jurisdiction was overruled but all of the respondent's special exceptions were sustained and all of petitioners' special exceptions were denied and overruled. The judgment particularly recited that the court refused to hear or consider any evidence and therefore rendered the judgment as a matter of law, after a hearing on law questions only.

The judgment of the Court of Civil Appeals affirmed the judgment of the District Court and denied petitioners' motion for rehearing. The Supreme Court of Texas denied application for writ of error and overruled petitioners' motion for rehearing.

The Court of Civil Appeals refused to discuss the various federal questions involved which had been raised in the District Court and which that court considered and decided against petitioners. These same federal questions were raised in the appellate courts but they refused to consider same. Both motions for rehearing, that is the motion for rehearing in the Court of Civil Appeals and the motion for rehearing in the Supreme Court pled in detail the various federal questions raised here. Such questions have consistently been brought before the District Court, Court of Civil Appeals and the Supreme Court.

ARGUMENT.

I.

The Fourteenth Amendment to the U. S. Constitution was not proposed by two thirds of both houses of the Congress as required by Article V of the Constitution. Consequently the District Court erred in holding that petitioners' suit was barred by the Fourteenth Amendment because it was never validly proposed and is void. The appellate courts likewise erred in affirming, or refusing to review, that judgment.

On February 21, 1866, both houses of Congress passed the following Concurrent Resolution:

> "*Be it resolved by the House of Representatives,* (the Senate concurring,) That in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States until Congress shall have declared such State entitled to such representation." (The Congressional Globe, February 21, 1866.)

According to the historical note appearing under the Fourteenth Amendment, U.S.C.A. Annotated Constitution, Part Three, p. 3, this amendment was proposed to the legislatures of the several states by the 39th Congress on June 16, 1866, which was several months after the senators from the eleven (11) southern states had been excluded from the Senate, in violation of that part of Article V of the constitution which states:

" * * that no state, without its consent, shall be deprived of its equal suffrage in the Senate."*

According to our examination of the Congressional Globe, the resolution proposing the Fourteenth Amendment was passed on June 8, 1866, by the Senate with a vote of 33 yeas, 11 nays and 5 absent. The resolution submitting the amendment was adopted by the House of Representatives by a vote of 120 yeas, 32 nays and 32 not voting (Congressional Globe, 39th Congress, First Session, pp. 3042, 3149).

In June, 1866, when the Congress adopted the resolution proposing the amendment there were 36 states in the Union (Biographical Dictionary of the American Congress, pub. by U. S. Government Printing Office 1950, pp. 290-299). Nebraska was admitted into the Union on March 1, 1867 (The Book of States 1958-1959, pub. by the Council of State Governments, Chicago, Illinois, Volume XII, p. 490). Senators Tipton and Thayer of Nebraska were seated on March 2, 1867 and March 4, 1867, respectively. Biographical Dictionary of the American Congress, *supra*, p. 294, note.

There were therefore thirty-seven (37) states as stated by William H. Seward, Secretary of State, in his first certification that the amendment had been ratified, dated July 20, 1868, although in that certification he was apologetic about it and in effect admitted that he would not know whether the amendment had been adopted or not. He stated that it appeared from the documents on file that the newly established bodies *"avowing themselves to be, and acting as legislatures respectively of the states of Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama"* had ratified the amendment. Seward apparently well knew that the legislatures so acting for said states did not represent the people of those states.

He further stated that it appeared from the official documents that Ohio and New Jersey passed resolutions respectively withdrawing the consent of each of said states to the amendment and,

> "* * *. It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual for withdrawing the consent of said two states or either of them to the aforesaid amendment."

Seward however counted both Ohio and New Jersey as having ratified the amendment and also certified that the six southern states mentioned had ratified same. In other words he held that a state can change its vote from rejection to ratification but that a state cannot change its vote from ratification to rejection although such change is effected prior to certification by the Secretary of State of the United States.

It is obvious however that two-thirds of both houses did not propose the amendment. At the particular time when the resolution was adopted by the Congress proposing the amendment there should have been seventy-two (72) Senators. Twenty-two (22) of them had been excluded because they came from the southern states. There were only forty-nine (49) Senators remaining because Senator Stockton of New Jersey was removed from office and his seat declared vacant March 27, 1866. His successor did not take office until December 3, 1866 (Biographical Dictionary of American Congress, p. 295).

In June, 1866, therefore of the forty-nine (49) Senators remaining in the Senate, 33 voted to submit the amendment, that is in favor of the resolution, 11 voted against it and 5 were absent. The Senate therefore, for its own purposes, concluded that there were only forty-nine (49)

Senators, which is a rank and obviously untrue assumption, and the Senate as then constituted perpetrated a fraud upon eleven (11) states by holding that the eleven (11) states had no right to participate in the discussion of the proposed amendment. There was a similar discrepancy in the vote in the House of Representatives. Such action particularly violated that provision of Article V of the Federal Constitution to the effect "* * * *that no state, without its consent, shall be deprived of its equal suffrage in the Senate.*"

Apparently the Congress was laboring under the impression that the southern states had completely seceded from the Union and had to get back in, but this court in numerous decisions held that the eleven (11) rebellious states never left the Union. If the southern states did not leave the Union, then obviously the proposal of the Fourteenth Amendment was invalid. The senators and representatives of the eleven (11) southern states were excluded from the argument and debate, that is, from consideration of the resolution proposing the amendment which certainly is contrary to the intent and meaning of Article V of the Federal Constitution.

It is true that this court has held that a two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present, assuming the presence of a quorum, and not a vote of two-thirds of the entire membership, present and absent. *Rhode Island* v. *Palmer*, 40 S. Ct. 486, 253 U.S. 350. Such a holding however does not give the majority of the Senate the right to exclude from its deliberations the Senators of certain states, in this instance eleven (11) states.

The Northern states had the military might and power to change the system of government of the United States

but did not do so. Article V of the U. S. Constitution was not changed or amended. But Congress denied the Southern states representation in that body contrary to the Constitution. This court has always insisted that the so-called rebel states were never out of the Union as is apparent from the following quotation from the decision of *White* v. *Hart*, 13 Wall. 646, 20 L.Ed. 685, viz.:

> "In the several reconstruction acts, the language used in this connection is, that the state in question 'shall be declared entitled to representation in Congress, and Senators and representatives shall be admitted therefrom.' Act of March 2, 1867, 14 Stat. 429; act of March 23, 1867, 15 Stat. 4. 'Shall be entitled and admitted to representation in Congress as a state of the Union, when,' etc. Act of June 25, 1868, 15 Stat. 73. And, lastly, in the final acts as to Georgia, 'It is hereby declared that the state of Georgia is entitled to representation in the Congress of the United States.' Act of July 15, 1870, 16 Stat. 364.
>
> "The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed states had not been out of the Union, and that to bring them back into full communion with the loyal states, nothing was necessary but to permit them to restore their representation in Congress." (p. 687).

The resolution adopted in 1866 denying said states representation in both houses of Congress, was a fraud upon them. The Fourteenth Amendment has never been properly and lawfully submitted to the several states by Congress.

In the decision of *Keith* v. *Clark*, 97 U.S. 454, 24 L.Ed. 1071, this court said:

> "The political society which in 1796 became a State of the Union, by the name of the State of Ten-

nessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee. Its Executive, its Legislative, its Judicial Departments have continued without interruption and in regular order. It has changed, modified and reconstructed its organic law or State Constitution more than once. It has done this before the rebellion, during the rebellion and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

"This political body has not only been all this time a State, and the same State, but it has always been one of the United States; a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without any reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement." (p. 1074).

It was contended in that case that bills of the Bank of Tennessee which could be used for the payment of taxes were invalid because they were issued during the war years, that is after May 6, 1861, while the state was in insurrection. Commenting on that contention the court said:

"The provision of the State Constitution does not go upon the ground that the state bonds and bank-notes, which it declared to be invalid, were issued in aid of the rebellion, but that they were issued by a usurping government; a reason which we have already demonstrated to be unsound. Not only is there nothing in the Constitution or laws of Tennessee to prove that these notes were issued in support of the rebellion but there is nothing known to us in public history which leads to this conclusion." (p. 1075).

See also *Texas* v. *White*, 7 Wall. 760, 19 L.Ed. 227; *Gunn* v. *Barry*, 15 Wall. 610, 21 L.Ed. 212.

II.

More than one-fourth of the then states in the Union affirmatively rejected the Fourteenth Amendment when it was originally submitted; consequently it was necessary that said amendment be resubmitted by the Congress because said rejection finally killed the amendment as proposed originally. Whether the Fourteenth Amendment was lawfully adopted in accordance with the U. S. Constitution is a judicial question, not a political question, and it is the duty of this court to make that decision.

In the decision of *Wise* v. *Chandler*, 108 S.W.2d 1024, cert. granted 58 S.Ct. 831, 303 U.S. 634, Dis. 59 S.Ct. 992, 307 U.S. 474, the court considered a suit for the purpose of enjoining the governor and the other defendants from certifying to the Secretary of State of the United States, the Presiding Officer of the U. S. Senate and the Speaker of the House of Representatives copies of a resolution adopted by the Kentucky General Assembly purporting to ratify the so-called Child Labor Amendment to the U. S. Constitution on behalf of the State of Kentucky.

In that decision the court said, in part:

> "Even if it be conceded that a State might reject an amendment and later, while the amendment is still before the people change its position thereon, certainly this power could not logically be said to exist after an amendment has been rejected by more than one-fourth of the States and these rejections duly certified to the Secretary of State of the United States." (p. 1027).

The court quoted at length from the decision of *Dillon* v. *Gloss*, 256 U.S. 368, 41 S.Ct. 510, to the effect that under Article V of the U. S. Constitution the ratification must be within some reasonable time after the proposal. The court pointed out that the ratification by a state of a Constitutional Amendment is an expression of the assent of the state to the proposed amendment and that it is the prevailing, although not unanimous view, of writers on the question that a resolution of ratification of an amendment to the Federal Constitution whether adopted by the legislature or a convention is irrevocable. The court commented on the fact that a contrary doctrine has been advanced to the effect that while an act of ratification is final and irrevocable, an act of rejection is no obstacle to a subsequent ratification. The court stated that the Thirteenth Amendment was adopted almost as a matter of course following the victory of the Union armies but an entirely different situation exists with reference to the Fourteenth Amendment.

The Kentucky Court of Appeals also held as follows:

> "We think the conclusion is inescapable that a State can act but once, either by convention or through its Legislature, upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to

consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless the additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the 'offer' of the amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, supra, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by Congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the purported ratification by Kentucky in 1937 seems inevitable. The proposition is succinctly stated in a letter published in the July, 1934, number of the American Bar Association Journal, written by Mr. Frank W. Grinnell, of the Boston bar. He says:

> 'Since the Constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of common sense and orderly procedure from the decision just referred to (Dillon v. Gloss) that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated until Congress sees fit to resubmit it. Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.' " (p. 1033).

A Writ of Certiorari in the Chandler case was granted by this court but later dismissed on the ground that after the Governor of Kentucky had forwarded the certification of

the ratification of amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination (59 S.Ct. 992, 307 U.S. 474). In other words, the Supreme Court of the United States did not consider the merits of the contentions urged in *Wise* v. *Chandler, supra.*

In that same volume of reports Chief Justice Hughes in *Coleman* v. *Miller,* 307 U.S. 433, 59 S.Ct. 972, considered an original proceeding in mandamus brought to compel the Secretary of the Senate of the State of Kansas to erase an endorsement of the Senate resolution ratifying the Child Labor Amendment to the Federal Constitution, and requesting that same should be endorsed that it was not passed, etc. In the course of that opinion Justice Hughes cited various historic instances stating that in 1865 the Thirteenth Amendment was rejected by the legislature of New Jersey which was subsequently ratified but the question did not become important as ratification by the requisite number of states had already been proclaimed, but that the question did arise in connection with the adoption of the Fourteenth Amendment. He commented at some length with reference to the changing of rejection by certain states to ratification and referred to the Congress adopting a concurrent resolution deciding that three-fourths of the states had ratified the Fourteenth Amendment which resulted in Secretary of State Seward so proclaiming on July 28, 1868, which was his second proclamation on the subject.

It was then stated in said opinion that the decision as to the validity of the ratification of the Fourteenth Amendment by the political department of the government had been accepted saying:

> "We think that in accordance with this historic precedent the question of the efficacy of ratifications

by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." (p. 980).

This evasion of responsibility by this court should not continue. The question is clear-cut. More than one-fourth of the states affirmatively rejected the proposed amendment killing it. A similar amendment could be again submitted but the rejected amendment could not be revived or resurrected. Of course there could be no objection to its resubmission in the manner specified by Article V of the Constitution. But until it is resubmitted the states cannot lawfully be coerced to change their rejection or ratification by federal troops and fraud.

The only decision by a federal court which we have found which attempts to pass upon these questions was decided by a U. S. District Court in Kentucky in *U. S.* v. *Gugel*, 119 F. Supp. 897. In that case it was urged that the Fourteenth Amendment was not constitutionally proposed because eleven (11) of the states were deprived of their equal suffrage in the Senate in contravention of Article V of the Constitution and also because of the following contention:

> "When so unconstitutionally proposed to the several (37) states the Congress submitted same to all states including those mentioned in (a) hereof resulting in rejection of the proposal by those states and others and on these dates: Texas, October 13, 1866; Georgia, November 9, 1866; Florida, December 1, 1866; Alabama, December 7, 1866; North Carolina, December 13, 1866; Arkansas, December 17, 1866; South Carolina, December 20, 1866; Virginia, January 9, 1867; Mississippi, January 25, 1867; Louisiana, February 5,

1867; Kentucky, January 8, 1867; Delaware, February 6, 1867; Maryland, March 23, 1867; California; House and Senate divided resulting in rejection, March 4, 1867." (p. 898).

We have checked the dates set out above and although such dates of rejection do not agree in every instance with the dates set out on page 45 of the 1952 publication by the library of Congress entitled "The Constitution of the United States of America" published by the U. S. Government Printing Office in 1953, nor the dates specified in the historical note under the Fourteenth Amendment set forth on page 3 of part three of the Constitution U.S.C.A., nevertheless the dates are approximately correct. It may be that there is some difference in date because there was some delay in the approving of the rejection by a Governor or because the rejection was not signed by the proper legislative officers, etc., but there is no question but that originally fourteen (14) of the then thirty-seven (37) states rejected the amendment. The so-called "changes" by the various states are dark and bloody pages in our history resulting in serious opposition to the enforcement of the amendment by approximately one-fourth of the states constituting the Union for almost one hundred (100) years. Even today the fires of opposition burn brightly through a large part of the nation because of the fraud and oppression which resulted in the so-called adoption of the Fourteenth Amendment.

The district court deciding *U. S.* v. *Gugel*, 119 F. Supp. 897, made no attempt to dispose of this question raised in that case except to state that since 1873 about 800 cases had been before the Supreme Court involving state statutes alleged to violate the due process clause of the Fourteenth Amendment and that it was of legal significance that the validity of the amendment had been accepted as a fact by the highest court of the land.

This court however has never failed to act on a question presented to it merely because it could have been decided seventy-five or a hundred years past. Never before has this question been squarely presented to the U. S. Supreme Court. All statements of this court concerning the validity of the Fourteenth Amendment are merely a recital of historical facts, which was made plain by Justice Hughes in his various decisions referred to above. The discussions of the Fourteenth Amendment and the historical facts concerning its alleged adoption were made in connection with other later proposed amendments. If the Fourteenth Amendment were unlawfully adopted then it should be stricken and held void.

Much of the Fourteenth Amendment is out of date. Sections 2, 3 and 4 of the Amendment, that is more than half of the Amendment, pertain to persons no longer in existence, that is those who participated in the so-called rebellion against the United States. The Fourteenth Amendment should be rewritten in the light of modern conditions. The stretching and torturing of the Amendment by judicial decision is a poor substitute for a proper amendment.

III.

The Legislatures of the eleven (11) Southern states that voted to ratify the Fourteenth Amendment were not true Legislatures but on the contrary mere puppets, the military governments in those states completely dominating and controlling their Legislatures. The members of those Legislatures were chosen or elected by fraud and force after a majority of the population in those states had been disfranchised. Consequently the Fourteenth Amendment was never lawfully ratified.

The following quotation from Wooten's History of Texas accurately portrays what happened in that state dur-

ing the reconstruction years following the collapse of the Confederacy, viz.;

> "In this condition of things, Congress took the reconstruction of the Southern States out of the hands of the President, and proceeded to inaugurate the measures known as Congressional Reconstruction, above described. The Senators and Representatives from Texas, like those of the other late Confederate States, were refused admission to the Congress. Military governments were established throughout the South. On March 19, 1807, General F. H. Sheridan, in command of the military department which included Texas, issued an order placing General Charles Griffin in command of the district of Texas. Governor Throckmorton gave such aid as was requested of him in carrying out the new plan of reorganization; but on July 30, 1867, General Sheridan, by military order, removed him from the governorship, 'as an impediment to reconstruction,' and appointed Elisha M. Pease in his place. All officers were removed by the military powers, and their places filled with those supposed to be in sympathy with the methods of Congressional Reconstruction. The Supreme Court as thus changed consisted of B. J. Davis, C. Caldwell, Amos Merrill, A. H. Latimer, and Livingston Lindsay. No man could hold an office, or participate in any of the elections that were to be held, unless he could take the 'Iron-Clad Oath' as it was called. This Oath was to the effect that the person taking it had not taken part in the late Rebellion, or given aid thereto; which, of course, disfranchised nearly all the white voters in the State. The 'Freedmen's Bureau' was established in Texas and the other Southern States—being a military court composed of United States officers, whose special duty it was to protect the negroes in their recently acquired rights, and a great many rights that they had not acquired." (pp. 376-377).

The Reconstruction Act, passed over the President's veto by the Congress March 2, 1867, begins as follows:

"An Act to provide for the more efficient government of the rebel states.

(1) Whereas, no legal State government or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas, it is necessary that peace and good order should be enforced in said States, until loyal and republican State governments can be legally established; therefore,

"Be it enacted, etc., That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina, the second district; Georgia, Alabama, and Florida, the third district; Mississippi and Arkansas, the fourth district; and Louisiana and Texas, the fifth district." (Sayles, Constitution of Texas, 1872, p. 7).

Said act contains the following statement also which completely nullified any existing legislative authority of the so-called legislatures of the states, viz.:

"Until the people of the said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same. * * *" (p. 9).

There were two supplementary reconstruction acts adopted by the Congress and passed over the President's veto on March 23, 1867 and July 19, 1867, which were more severe than the first act and provided that the holding of the convention, the voting, registration, and counting of the votes were all under the direct control of the command-

ing general of each district ond the commander of any district could suspend or remove from office or from the performance of official duties or the exercise of official powers any officer or person holding or exercising or professing to hold or exercise any civil or military office or duty in the district under any power, election, appointment or authority derived from any source (Sayles, Constitution of Texas, pp. 9-15, incl.).

The courts of Texas recognized that no civil government existed at the time the so-called Fourteenth Amendment was ratified as is apparent from the following quotation from a decision of the Supreme Court of Texas, *Ex parte Warren*, 31 Tex. 143, viz.:

> "We will add, however, that our present state government is provisional only in its character, and 'subject in all respects to the paramount authority of the United States.' Being thus 'subject,' and the act above referred to having been given us as a rule of action by the commander of the fifth military district, it would seem there is no room left for doubt." (p. 144).

A similar statement was made by the Supreme Court of Texas in *McClelland* v. *Shelby County*, 32 Tex. 13, wherein that court held that under the Reconstruction Act of March 20, 1867, the legislative power was in the military forces and no other legislative power existed in Texas, the court saying:

> "The orders issued by the commander of the fifth military district show that they exercised legislative power, and that this power was as full, ample and complete as if it were exercised by a senate and house of representatives. The power exists, but the exercise of this power is by a different body, but it is still exercised by the 'supreme power in the state, com-

manding what is right and prohibiting what is wrong,' or assuming to do so. And what is still more, this political power is not of few months' duration biennially, but like the executive, continuous, and always accessible." (p. 21).

The court also stated in that opinion that A. J. Hamilton assumed control of Texas as provisional Governor by order of the Military Department of the United States and that Hamilton therefore was vested with the power of the Commander-in-Chief of a conqueror over the conquered and that

> "* * * *it hence follows, that whatever he declared was, for the time being, law, being 'prescribed by the supreme power in the state.'* " (p. 20).

Under such conditions it is farcical to contend that the Legislature of Texas ratified the Fourteenth Amendment. The only legislative authority existing in Texas was the legislative authority of the Military Government and all officers, executive, judicial and legislative were completely under the control of the Military Government and held their offices by sufferance from that government.

This same condition existed throughout the South, that is in all the eleven (11) Southern States. Claude G. Bowers, in his book entitled "The Tragic Era—The Revolution after Lincoln" described the situation as follows:

> "In the mean time, under the autocracy of military masters, preparations were being made for registration, the calling of constitutional conventions, and the election of delegates. Many of the generals in control sought in every way to treat the people with respect, while others, like Pope, predicting the transfer of intelligence from whites to blacks within five years, and intoxicated with power, were busy in the decapitation of civil officials. The University of Georgia was closed

> because of a student's speech, and the sheriffs were removed in numbers. In Arkansas and Mississippi, the decent instincts of General Ord were overcome by political pressure, and with the closing of the courts the least semblance of liberty passed from Arkansas, with crime rampant. In Louisiana and Texas, General Sheridan, reveling in his unpopularity, was replacing white city officials in New Orleans with negroes, and, under the inspiration of an incendiary press and the Leagues, was permitting the Texas negroes to run amuck with guns and knives. In Alabama, the military despotism was complete, with soldiers in posts at intervals of twenty and thirty miles, fraternizing with the negro mobs. In Mississippi, with the courts open, forty-one men were tried by a military commission. Everywhere military authorities were interfering with the freedom of the press, and in Vicksburg an editor who had criticized Radical policies was tried by a military tribunal. When, denied a writ of habeas corpus, he appealed to the Supreme Court, Congress hurriedly deprived that court of jurisdiction." (pp. 215-216).

Bowers' work is fully annotated.

Many additional histories and texts could be cited in support of the proposition that the Fourteenth Amendment was never ratified by the duly elected Legislatures of the eleven (11) Southern States but on the contrary by willing mobs selected by a military government acting under all the pressures and hatreds incident to a bloody war recently concluded. The carpetbag regimes did not hesitate to use fraud and unlawful force to bring about the so-called ratification.

IV.

The Texas ordinances of 1866 and Section 34, Article XII, of the 1869 Texas Constitution attempted to invalidate all debts of the state created between January 28, 1861 and August 5, 1865. Likewise the Texas statutes of November 6, 1866 and May 2, 1871, created Auditorial Boards designed to adjust and refund the state debt by the payment of approved bonds with new bonds having different maturities and lower rates of interest than the old bonds, all of which violated Section 10, Article I, of the U. S. Constitution prohibiting the enactment of any law impairing the obligation of a contract.

V.

The district court and the appellate courts erred in holding that petitioners must plead as a prerequisite to asserting their cause of action how and under what circumstances Jeff Chapman (deceased) acquired, or came into possession, of the bonds involved, because such bonds are negotiable instruments and are payable to bearer and the possession of same by petitioners was sufficient proof of ownership. Such holdings impair the obligations of the contract reflected by the bonds and insert a condition in the bonds not originally there, to the holders' detriment and in violation of Section 10, Article I, of the U. S. Constitution.

The following argument applies to both of the above legal propositions.

16 C.J.S. 1277, correctly holds that constitutional provisions may as effectively impair the obligation of a contract as any statute, saying:

> "A state constitutional provision is a law within the meaning of the federal Constitution prohibiting laws impairing the obligation of contracts.

"A state constitution, or an amendment thereto, is a 'law' within the meaning of the federal constitution, prohibiting laws impairing the obligation of contracts."

See *Simpson* v. *Common County Line School District No. 31*, 275 S.W. 449; *Langever* v. *Miller*, (Tex.), 76 S.W.2d 1025; Note 12 C.J. 687; *Hard* v. *State*, (Ala.) 154 So. 77; *State* v. *Port of Palm Beach District*, (Fla.) 164 So. 851; *State* v. *Boring*, (Fla.) 164 So. 859; *Gray* v. *Moss*, (Fla.) 156 So. 262; *Rorick* v. *Board of Commissioners of Everglades Drainage District*, 27 F.2d 377; *State* v. *Jumel*, 2 S.Ct. 128, 107 U.S. 711.

The Act of November 6, 1866 (5 Gammel's Laws, 1040), provided that all classes of claims against the state must be presented and submitted to action of the board, which could approve or disapprove same, and if disapproved that said obligations were cancelled. If approved, the Governor should prepare a new coupon bond issue payable in ten (10) years, bearing interest at the rate of six per cent (6%) which new bonds should be exchanged for the old. This represented a reduction in interest from eight per cent (8%) to six per cent (6%) and a change in the date of the maturity of the bonds. The Act of May 2, 1871 (Gammel's Laws of Texas, Vol. 6, p. 67, 1025), provided for the continuance of said auditorial board. Such statutory devices for diluting a state debt or reducing its obligations have been held unconstitutional in many cases.

In 43 Am. Jur. 480, it is stated:

"* * * however, it has been held that to give a retrospective operation to a statute permitting public bonds to be called or redeemed before the stipulated maturity date, such statute having been enacted after the bonds were contracted for, would constitute an

impairment of the obligation of the contract, and that such bonds would not be held to be within the operation of such statute."

To the same effect see 9 Tex. Jur. 550; *Aransas Pass* v. *Keeling*, 112 Tex. 339, 247 S.W. 818.

In *Davis* v. *Gray*, 83 U.S. 203, 21 L.Ed. 447, the court said:

> "That the act of incorporation and the land grant here in question were contracts, is too well settled in this court to require discussion. Fletcher v. Peck, 6 Cranch. 137; N. J. v. Wilson, 7 Cranch. 166; Dartmouth Coll. v. Woodward, 4 Wheat. 518; Bank v. Knoop, 16 How. 369. As such they were written within the protection of that clause of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contract. The Ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. Von Hoffman v. Quincy, 4 Wall. 535, 18 L.Ed. 403. When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. Curran v. Arkansas, 15 How. 308." (p. 457).

See also *H. & T. C. R. R. Co.* v. *Texas*, 20 S.Ct. 545, 177 U.S. 66.

In *H. & T. C. R. R. Co.* v. *State of Texas*, 18 S.Ct. 610, 170 U.S. 243, this court held with reference to ordinances adopted in 1869 by a constitutional convention as follows:

> "In Quinlan v. Railway Co., 89 Tex. 356, 34 S.W. 738, it was held that a convention called to frame a

constitution to be submitted to a popular vote cannot pass ordinances and give them validity without submitting them to the people for ratification as part of the constitution.

"These ordinances were not so submitted, and we are not called on to express any opinion as to whether in view of the anomalous circumstances under which this particular convention met, the previous decisions of the supreme court of the state, or any other considerations, they, or either of them could be regarded as valid." (p. 616).

See also *Poindexter* v. *Greenhow*, 5 S.Ct. 903, 114 U.S. 270; *Chaffin* v. *Taylor*, 5 S.Ct. 924, 114 U.S. 309; *Woodruff* v. *Trapnall*, 51 U.S. 190, 13 L.Ed. 383; *Fletcher* v. *Peck*, 10 U.S. 87, 3 L.Ed. 162; *State of New Jersey* v. *Wilson*, 11 U.S. 164, 3 L.Ed. 303; *Town of Concord* v. *Portsmouth Savings Bank*, 92 U.S. 625, 23 L.Ed. 628; *Pacific R. R. Co.* v. *Constantine Maguire*, 87 U.S. 36, 22 L.Ed. 287, 282; *City of Los Angeles* v. *Los Angeles Water Co.*, 48 S.Ct. 736, 177 U.S. 58; *Dodge* v. *Woolsey*, 59 U.S. 331, 15 L.Ed. 401.

Texas has adopted the uniform negotiable instruments act and these bonds are negotiable instruments and meet all the requirements set out in Section 1, Article 5932, V.A.C.S., defining what is a negotiable instrument.

These bonds are bearer bonds as well as negotiable instruments and as stated in 6 Tex. Jur. 672:

"The title to negotiable paper payable to bearer or payable to order and endorsed in blank passes by the mere delivery."

In *Wilson County* v. *Third Nat'l Bank*, 103 U.S. 770, 26 L.Ed. 488, the bonds reading as follows were held negotiable, viz.:

"Know all men by these presents, that the County of Wilson, in the State of Tennessee, is indebted to the Tennessee & Pacific Railroad Company, or the holder hereof, * * *.

"The plaintiff in error next claims that the bonds sued on were not negotiable paper and therefore, the plaintiff below showed no right of action in itself.

"In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. Com. Dig. Merchant, F., 5; 3 Kent, Com., lect. 44, p. 77; Chit., Bills, ch. 5, p. 180, 8th ed.; Bayley, Bills, 120, 5th ed. Storey, Prom. N., sec. 44." (pp. 489, 490).

The coupons which were attached to the bonds likewise have all the qualities of commercial paper and possess the negotiability of passing from hand to hand by delivery after detachment from the bond. 43 Am. Jur. 401.

The possession of a bearer bond is *prima facie* proof of the holder's ownership thereof or right thereto. 6 Tex. Jur. 672; 6 Tex. Jur. 942, 943. The bonds prove themselves. Sub. (i) and (j), Rule 93, T.R.C.P.; *Butler* v. *Robertson*, 11 Tex. 142.

The burden was upon the state to prove that petitioners did not have valid title to these bonds because it is the rule that negotiable paper payable to bearer can be transferred merely by delivery and possession is *prima facie* evidence of title in the holder. *Union Nat'l Bank* v. *Morgan*, 245 S.W. 455, er. ref.

Obviously to engraft such requirements on these bonds would completely change their tenor and effect and impair

the obligation of the contract as set forth in the bonds in violation of Section 10, Article I, of the U. S. Constitution.

This court has held in many decisions that the remedy available to the injured party if the state refuses to live up to its obligation is a part of the obligation itself. In other words the remedy is an obligation of the contract in the constitutional sense, and it shall not be altered if it would result in the material weakening of the existing contract.

One of the earliest cases on this subject is *U. S. ex rel. Hoffman* v. *Quincy*, 4 Wall. 535, 71 U.S. 403, wherein the court said:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of the contract 'is the law which binds the parties to perform their agreement' " (p. 409).

If petitioners cannot recover on a negotiable instrument payable to bearer without proving how and under what circumstances the bond was acquired by the deceased, then such a holding will destroy remedies which were a part of the contract in violation of Section 10, Article I, of the U. S. Constitution.

VI.

The district court and the appellate courts erred in holding that Article 842g, V.A.C.S., which authorized suit by all Texian Bond holders to the extent only that such bonds had been reimbursed to the State by the Federal Government (provided that suit should be filed within two years from the date of the act, 1951) barred petitioners' suit, because there is no federal statute authorizing such reimbursement; the federal act providing for reimbursement of state claims (Ch. 241, Sec. 1 of the Acts of the 47th Congress, approved June 27, 1882, 22 U. S. Stats. at Large, p. 111) did not apply to claims from Texas, arising after October 20, 1865, by its terms, and said Article 842g therefore did not apply to petitioners' bonds.

VII.

The State is barred from pleading limitation as that term is ordinarily applied. Neither limitation nor laches began to run until valid authority was given petitioners to bring suit against the state which was not accomplished until the passage of H.C.R. No. 44, effective June 11, 1957. The Texas courts administer both law and equity, consequently both laches and stale demand are governed by the state statutes of limitation which apply irrespective of whether the relief sought is legal or equitable.

The following argument applies to both propositions VI and VII set out above.

Article 842g enacted by the 52nd Legislature in 1951 reads, in part, as follows:

> "Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prose-

cute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

"Section 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act."

The remaining sections, 3 to 7, inclusive, provide for service, that the state may appeal, the invalidity of any part of the act shall not render invalid the remaining parts, nothing shall be construed as tolling the statute of limitation or reviving the cause if it has been barred and that nothing in the act shall be construed as an admission of liability.

The above act could not apply to petitioners or their bonds here sued upon because not only did the federal government not reimburse the state for the bonds in question but the only federal act which could possibly apply to any such repayment is Chapter 241, Acts of the 47th Congress, Session 1, approved June 27, 1882, Vol. 22, U.S. Stats. at Large, p. 111, excluded said debts. That act stated that the United States would repay expenditures made for the defense of the frontier by Colorado, Oregon, Nebraska, California, Kansas, Texas, Nevada and the territories of Washington and Idaho but it particularly provided as to Texas that the Federal Government would pay only those claims from Texas arising after October 20, 1865.

In 1953 the Texas Legislature adopted a resolution, H.C.R. No. 118 authorizing suit by these petitioners against the state on these bonds but it contained a provision that the State of Texas would be limited to those defenses which a private corporation might have, therefore, said

resolution was unconstitutional. *Martin* v. *Shepherd*, 145 Tex. 639, 201 S.W.2d 810; *State Highway Department* v. *Gorham*, 139 Tex. 361, 162 S.W.2d 934. The invalidity of the 1953 resolution generally seems to be almost conceded by the state and appellate courts. Consequently in 1957 the 55th Legislature at its regular session adopted H.C.R. No. 44, approved June 11, 1957, which resolution authorized suit on these bonds against the state by Mrs. M. B. Buford, the heir of Jeff Chapman, and George B. Lindler, his administrator. In that resolution the 55th Legislature had these statements to make with reference to the Legislature's previous authorization to sue, viz.:

> "WHEREAS, The Fifty-second Legislature of the State of Texas duly enacted an Act set forth as House Bill No. 309, Chapter 392, Page 677 of the 1951 General Laws of Texas, which Act is also Article 842g of Vernon's Texas Civil Statutes wherein the State authorized suit on bonds comprising said Texian Loan to a limited extent, that is for the moneys alleged to be in unpaid principal and interest on said bonds, prorated to the extent only of the amount reimbursed to the State of Texas by the United States Government, which the said Mrs. M. B. Buford and said Administrator contend did not apply to the bonds they hold and which they are unable to prove, such a requirement placing a burden on the bondholders that was no part of the original obligation and therefore said parties were prevented from asserting their rights as bondholders under said Article 842g; and
>
> "WHEREAS, The Fifty-third Legislature, at its Regular Session, by House Concurrent Resolution No. 118, duly adopted by the House and Senate of the Texas Legislature at said Session and approved June 8, 1953, did authorize the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, to file suit on the bonds just above referred to, but specified in

said Resolution that said suit should be tried 'in like manner as similar suits instituted against private corporations are tried' which provision is unlawful and has been held to invalidate such Resolutions in other cases by the Supreme Court of Texas, and therefore, the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, have not been able to properly maintain their suit, and it is the intention of the State of Texas to give said proper parties the opportunity to press their suit as bondholders without the limitations referred to, this Resolution being in addition to said Act and said Resolution, and any and all other Acts and Resolutions pertaining to the subject matter hereof; now, therefore, be it

"RESOLVED by the House of Representatives, the Senate of Texas concurring, That the said Mrs. M. B. Buford, her heirs, executors, administrators and assigns and George B. Lindler, Administrator of the Estate of Jeff Chapman, deceased, and his successors are hereby authorized to file, prosecute and maintain a suit in any court of Travis County, Texas, having jurisdiction of the amount in controversy, against the State of Texas, for the principal amount of said bonds and interest accrued to the maturity date of the bonds only;"

The same resolution likewise provided:

"RESOLVED, That suit may be instituted upon said bonds at any time within two (2) years from the effective date of this Resolution and the rights and remedy provided for herein shall be cumulative; and, be it further

"RESOLVED, That the said Mrs. M. B. Buford, her heirs, executors, administrators and assigns and/or George B. Lindler, Administrator, and his successors shall have the right to appeal from any adverse judgment rendered against them, as in other causes. The State of Texas may likewise appeal from any

judgment rendered against the State, as provided by law, without executing any appeal or supersedeas bond; and, be it further

"RESOLVED, That the permission and authority granted by this Resolution be in nowise restricted or circumscribed except by the terms hereof;"

The granting of authority to sue the state by resolution is a well recognized method of securing that permission. In *State* v. *Isbell*, (Tex.) 94 S.W.2d 423, the Commission of Appeals, in an opinion which the Supreme Court adopted, held as follows:

"But we are of the opinion that a mere consent by the state to be sued, without the recognition of any liability, may be given by joint or concurrent resolution signed by the Governor, as was done in this case. The Legislature has never seen proper, so far as we know, to make provision by general law for suits against the state under any and all circumstances. Such a policy would lead to endless litigation against the sovereignty. It has, therefore, been the policy of the Legislature to grant the privilege of suing in particular instances. If, in the judgment of the Legislature, a situation is presented which entitles a citizen to resort to the courts of the state for ascertaining the merits of his supposed claim against the state, it would seem that this privilege may be as effectually and expeditiously granted by joint resolution, approved by the Governor, as by a special act of the Legislature. We think the reasoning of the Court of Appeals of Kentucky, in the case of Commonwealth v. Haly, 106 Ky. 716, 51 S.W. 430, followed in the later case of Commonwealth v. Lyon, (Ky.) 72 S.W. 323, is sound, even though the constitutional provisions of that state may not be exactly like those of our state." (p. 425).

See also *National Biscuit Co.* v. *State*, 129 S.W.2d 494, rev. on other grounds, 135 S.W.2d 687.

In *Terrell* v. *King*, 118 Tex. 237, 14 S.W.2d 786, the court said:

> "It is no longer an open question in Texas that a joint resolution of both houses, approved by the Governor, reflects the command and will of the state in one of the modes prescribed by the Constitution, and is as binding as a statute." (p. 793).

It is important to note that the 1957 Legislature of Texas limited petitioners' recovery to the principal and the interest to the date of maturity of the bonds, that is, July 1, 1877. The bonds were payable with interest at 8% per annum on that date in New Orleans, Louisiana. A bond payable in money means lawful money at the time of payment. 11 C.J.S. 1059; *White* v. *Jones*, 88 N.C. 166; *O'Neal* v. *McKewn*, 1 S.C. 147, in what is sometimes now called Book 30 of S. C. Reports. These cases concerned obligations made during the War years or payable during the War years.

As a general rule a state has no right to claim limitation as a defense against its debts. In *Whatley et al.* v. *Patten*, 31 S.W. 60, the court said:

> "Upon the question of the right of Whatley or the state to invoke the statute of limitations in behalf of the state, our supreme court has held that, since a cause of action could not accrue against the state, on account of its immunity from suit, without its consent, the statute of limitation cannot be invoked in its behalf. Stanley v. Schwalby, 85 Tex. 352, 19 S.W. 264." (p. 62).

See also *Stanley* v. *Schwalby*, 85 Tex. 352, 19 S.W. 264.

Railroad Commission v. *Beacon Oil & Refg. Co.*, 247 S.W.2d 293, holds that when the State is sued properly under authority granted by a statute or resolution then limi-

tation begins to run from the time of the accrual of the action, 28 Tex. Jur. 138. In this particular case the resolution was approved, as stated, June 11, 1957, and the suit was filed the following month. H.C.R. No. 44 authorized suit within two years from June 11, 1957. It has long been the law in Texas that the state may waive limitation as is set out in *Travis County* v. *Matthews*, 235 S.W.2d 691, er. ref. n.r.e. where the court said:

> "On the other side of the ledger we find that the State may waive limitations. State v. Elliott, Tex. Civ. App., Galveston, 212 S.W. 695 (Writ Ref.). A school district may waive limitations. Frout v. Fowlerton Consolidated School District No. 1, Tex.Civ.App., Beaumont, 111 S.W.2d 754. The Supreme Court did not question the power of a city to waive limitations in City of Houston v. Jankowskie, 76 Tex. 368, 13 S.W. 269. See also City of Tyler v. L. L. Jester & Co., Tex. Civ.App., 74 S.W. 359, affirmed 97 Tex. 344, 78 S.W. 1058.
>
> "In 53 C.J.S., Limitations of Actions, § 24, p. 959, it is said: 'Power to waive limitations has been held to extend to a state, a county, and a municipal corporation.'" (p. 698).

H.C.R. No. 44 is not amendatory of Article 842g; that article is limited to a particular class of bondholders, that is only those who had been reimbursed by the federal government. H.C.R. No. 44 authorized the suit by those who had not been so reimbursed.

Under the Texas decisions the statutes of limitation apply to both legal and equitable actions. In 27 Tex. Jur. 224 the rule is stated as follows:

> "Effect of Statute of Limitations. In jurisdictions in which law and equity are administered in separate tribunals, the general rule is that courts of equity will

be governed by the same rules of limitation that prevail in analogous actions at law. 'Ours being a blended system—the same court administering both law and equity—our statutes of limitation are equally applicable, whether the relief sought be legal or equitable'." (p. 24).

See also 27 Tex. Jur. 19.

If petitioners recover, the delay in filing their suit could not possibly injure the State of Texas, Petitioners are not allowed to recover interest up to date, *petitioners are only allowed (under H.C.R. 44) to recover the principal and interest of the bonds to the date of maturity, July 1, 1877.*

In *Higgins* v. *Johnston*, 3 S.W.2d 937, the court said:

"In jurisdictions where law and equity are administered in separate forums, the general rule is that courts of equity will be governed by the same rules of limitation that prevail in analogous cases in actions at at law. Ours being a blended system—the same court administering both law and equity—our statutes of limitation are equally applicable, whether the relief sought be legal or equitable. Munson v. Hallowell, 26 Tex. 475, 84 Am.Dec. 582; New York & T. Land Co. et al. v. Hyland et al., 8 Tex.Civ.App. 601, 28 S.W. 206; Fairss v. Cockrell, supra; Watson et ux. v. T. & P. R. Co. (Tex.Civ.App.) 73 S.W. 830; Smith v. Fly, 24 Tex. 345, 76 Am.Dec. 109; Walker v. Emerson, 20 Tex. 706, 73 Am.Dec. 207; Davis et al. v. Howe, (Tex.Com.App.) 213 S.W. 609; 37 C.J., p. 791, § 132; 17 R.C.L., p. 736, §§ 99 and 100." (p. 941).

The State of Texas claims that no demand has been made for the payment of these bonds for more than seventy-five years, which is wholly untrue. Petitioners alleged in their petition:

"* * * that though often requested, defendant has hitherto failed and refused, and still refuses to make any payment on said bonds."

In 27 Tex. Jur. 226 it is stated:

"Equity follows the law also in determining the time for which the period of laches may be reckoned."

In *State* v. *Elliott*, 212 S.W. 695, an employee of a state railroad was injured and he was given leave to sue the state and it was contended that his action was barred by limitation but the court held that limitation did not begin to run in the state's favor until permission to sue had been granted but the court also held that if it could be said that limitation did begin to run prior thereto, then *there was no constitutional provision requiring the state to plead limitation as a defense and the Legislature had the power in granting the permission to sue to waive limitation and provide for a two year period next ensuing within which suit should be filed.*

If any limitation applied to petitioners' suit prior to the time of the granting of a lawful permission to sue (which we deny) then certainly the State of Texas had the right to waive it and did so in the 1957 resolution.

CONCLUSION.

We have not discussed various Texas constitutional provisions also pled by the respondent with reference to assuring all men equal rights, or prohibiting the granting of money out of the State Treasury for claims not provided for by pre-existing law, or prohibiting the grant of public money to individuals or an appropriation for private purposes, for the reason that it has been held in numerous decisions that the granting of permission to sue does not

deny any person equal rights. As to the other contentions they all presume or assume that the bonds are invalid. If they are invalid then of course said constitutional provisions apply but until it is established or proven that the bonds are invalid such defenses do not apply.

Approximately three-fourths of the Fourteenth Amendment applies to the dead. Sections 2, 3 and 4 pertain primarily to citizens who participated in the rebellion against the United States. Only one survivor of the Union and Confederate Armies survives, a Mr. Williams of Houston, Texas, whose life is uncertain. When he is gone the greater part of the Fourteenth Amendment will apply to no one.

Section 1 of the Fourteenth Amendment has been so twisted and tortured by decisions involving economic, personal and governmental conflicts of all kinds that there is great uncertainty as to its meaning. We need a new Fourteenth Amendment. The present amendment has outlived its usefulness.

Furthermore it was never validly and lawfully adopted and it has the undying hatred of approximately a fourth of the people of the United States, who regard it as an expression of tyranny. Its adoption or ratification was accomplished by unlawful force and fraud and by numerous violations of the constitution itself. Never before has it been directly attacked in this court.

In certain opinions of the court to which we have referred reference has been made to its historical significance but those decisions involved later amendments. Comments have appeared in certain decisions of this court to the effect that although of dubious ancestry the Fourteenth Amendment has been accepted by the people. Such is not

the case, but even if it were such acceptance could not blot out the shame and illegality of its adoption.

Petitioners respectfully request that writ of certiorari issue to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

DAN MOODY,
Norwood Building,
Austin, Texas,

WHARTON WEEMS,
c/o VINSON, ELKINS, WEEMS & SEARLS,
Esperson Building,
Houston 2, Texas.

FRED W. MOORE,
1812 South Coast Building,
Houston 2, Texas,

Attorneys for Petitioners.

Copies of the above petition for writ of certiorari were mailed to the Honorable Will Wilson, Attorney General of Texas, State Capitol, Austin, Texas, attention of L. P. Lollar and Howard Mayes, Assistants, this ..... day of August, 1959.

.....,
Attorney for Petitioners.

APPENDIX

Mrs. M. B. BUFORD et al., Appellants,

v.

STATE of Texas, Appellee.

No. 10631.

Court of Civil Appeals of Texas.
Austin.

Jan. 28, 1959.

Rehearing Denied March 4, 1959.

ARCHER, Chief Justice.

This is an appeal from an order of the District Court sustaining defendant's special exceptions numbered 1, 2, 3, 4 and 5, and overruling the special exceptions of plaintiffs. We will hereinafter set out the several exceptions in more detail.

This suit is on forty six One Thousand Dollar Texian Loan Bearer Bonds issued by the State of Texas under an Act of the Legislature, approved April 8, 1861, the bonds being payable to bearer July 1, 1877, with interest at 8% per annum from July 1, 1862 until paid. The bonds are all dated January 1, 1862, except bond No. 5 which is dated March 25, 1862.

Appellants as plaintiffs alleged that they are the owners and holders of forty six One Thousand Dollar Texian Loan Bearer Bonds issued under an Act of the Texas Legislature, approved April 8, 1861, payable and due July 1877, with interest coupons for January 1, 1863, July 1, 1863, January

1, 1864, July 1, 1864 and January 1, 1865 which were clipped; that all the bonds were duly registered by the State Comptroller and the State is liable for the payment of the bond.

That by House Concurrent Resolution No. 44, passed by the 55th Legislature, Regular Session, 1957, p. 1585, approved by the Governor and filed with the Secretary of State June 12, 1957, plaintiffs were authorized to file this suit at any time within two years from the effective date of the resolution, and that the suit is limited for the principal amount of said bonds and interest to the maturity date of the bonds and prayed for judgment.

The Special Exceptions filed by the State, as defendant are:

> "(1) * * * that Plaintiffs' suit was not filed in the time and manner provided by law; namely, House Bill 309, Chapter 392 of the Acts of the 52nd Legislature, Regular Session, 1951, Page 677 (Article 842g, Vernon's Civil Statutes), which provides, in part, as follows:
>
> "'Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds * * *
>
> "'Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act.' * * *
>
> "(2) The Defendant, State of Texas excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs' suit was not filed in

the time and manner provided by Article 5527, Vernon's Civil Statutes, which provides, in part, as follows:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

" '1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.'

"and that Plaintiffs' suit and cause of action, if any they have, was at the time of filing of Plaintiffs' original petition barred by the express terms of said statute in that it was not filed within four years from the date the same accrued.

"(3) The Defendant, State of Texas, excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs and any under whom they may claim have silently stood by and have wholly failed either to give notice or make demand upon the Defendant, State of Texas, or any officer or agent thereof charged with any official duty in connection with said bonds for approximately 75 years, and nowhere do Plaintiffs allege that said bonds were ever presented for payment at maturity or thereafter to the State of Texas or any officer or agent thereof charged with any official duty in connection with said bonds, and under the circumstances Plaintiffs are guilty of laches and are not now entitled to prosecute their claim for recovery upon said bonds; to render any judgment therefor and to pay the same would be contrary to and in violation of the public policy of this State, the presumption being that the State of Texas will pay promptly all valid and legal obligations of the State or make provision therefor.

"(4) The Defendant, State of Texas, specially excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs are now en-

deavoring to enforce a stale demand against the State of Texas, it affirmatively appearing that said bonds matured more than 75 years past and Plaintiffs are now in law and equity estopped from presenting and prosecuting said suit against the State of Texas upon said stale demand, the presumption being that if valid they would have long since been paid or provision made therefor.

"Wherefore, the Defendant, State of Texas, prays that the foregoing exceptions and each of them be sustained and this suit be by the Court dismissed.

"(5) Without waiving the foregoing exceptions the Defendant specially excepts to the sufficiency of Plaintiffs' petition in that it nowhere alleges when and how and under what circumstances Jeff Chapman, under whom Plaintiffs purport to hold said bonds, acquired or came into possession of them. In this connection the Defendant, State of Texas, will show the Court that Jeff Chapman was not born until several years after the maturity date of said bonds. Without this information, which is particularly within the knowledge of Plaintiffs, the Defendant is not able to properly prepare for the trial of this case. Plaintiffs should, therefore, be required to amend their pleading to disclose said information, failing in which Plaintiffs' suit should be dismissed."

An answer subject to the plea to the jurisdiction and special exceptions, was a general denial and that Concurrent Resolution No. 44 is unconstitutional and void and violates Section 3 of Article I of the Constitution, Vernon's Ann.St., and suit was not brought in accordance with House Bill No. 309, and is barred by the four year statute of limitation and that the bonds were issued after the State had seceded and was a member of the Confederacy and for the purpose of financing the war, and pled Section 4 of the Fourteenth Amendment. Further answer was that Ordi-

nance No. 2, 5 Gammel Laws 887 (1898) providing in part that all debts created in aid of the late war were declared void, and that the Legislature was forbidden to make any provision for the payment of any debts so contracted from the 28th of January, 1861 until the 5th day of August, 1865, and further pled Ordinance No. 9, 5 Gammel Laws of Texas 894, passed on March 27, 1866, and pled other constitutional inhibitions, and that plaintiffs are guilty of laches and are estopped to prosecute the demand.

Plaintiffs by supplemental petition alleged that the granting of the right to sue by Resolution No. 44 the State did not create or destroy any rights in the State but waived the immunity against suit, and gave plaintiffs no cause of action that did not exist by virtue of a contract of the State; that the defense of limitation or laches is not available to the State and that Article 842g, V.A.C.S. is not applicable and that the ordinances pled by the State have no effect as law, but are the wishes of certain persons and matters of opinion; that the bonds are negotiable instruments and import a valuable consideration, and were not appropriations for private purpose and are not barred; that the arbiter's reports are void; and lodged a general denial.

A similar suit to this one was filed September 20, 1954 by the same parties in the 11th District Court of Harris County, with like allegations, but claiming the right to sue by virtue of House Concurrent Resolution No. 118. Laws 1953, p. 1155. Similar answers to those in the present suit were filed. The suit was dismissed on motion of plaintiffs on July 22, 1957.

Since the court sustained the exceptions hereinabove set out we have not stated the pleadings more in detail but have given attention to such pleadings and have set out in brief a substantial resume of such pleadings.

The appeal is based on ten points and are to the effect that Article 842g enacted in 1951 was of such nature as not to grant permission to sue; that Resolution No. 118 adopted by the 53rd Legislature in 1953 was unconstitutional on its face; that House Concurrent Resolution No. 44, effective June 11, 1957, is as binding as a statute and lawfully granted permission to sue the State; that the State can only plead limitations subsequent to June 11, 1957; that laches follow the law; that the bonds are payable to the bearer and are negotiable instruments; that the ordinance of 1866 invalidating debts contracted by the Confederacy, with reference to adjusting and funding the State debt are in violation of Section 10, Article I of the Federal Constitution; that the issuance of the bonds are not in violation of Section 44, Artfcle III of the Texas Constitution; that the bonds do not represent a debt incurred in aid of the Rebellion against the United States; and finally that the Fourteenth Amendment to the Federal Constitution was unlawfully adopted by the various states and is void.

Appellants contend that Article 842g granted no permission to sue, because of the phrase "prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds" since none of the bonds here involved were reimbursed in whole or in part:

The further position of appellants is that Resolution No. 118 was unconstitutional on its face because of the phrase "in like manner as similar suits instituted against private corporations are tried."

Martin v. *Sheppard*, 145 Tex. 639, 201 S.W.2d 810 is cited.

The further contention is that House Concurrent Resolution No. 44 particularly provided for rights and remedies

to be cumulative and is as binding as a statute and is not in violation of Section 3 of Article I of the Texas Constitution and Section XIV of the U. S. Constitution and cite a number of cases such as *Duke Power Co.* v. *South Carolina Tax Commission*, 4 Cir., 81 F.2d 513; 298 U.S. 669, 56 S. Ct. 834, 80 L. Ed. 1392; *Martin* v. *Sheppard, supra,* and cases cited therein; *State* v. *Elliott,* Tex.Civ.App., 212 S.W. 695, er. ref.; *State* v. *Isbell,* Tex.Comm.App., 127 Tex. 399, 94 S.W.2d 423.

Appellee makes six counterpoints contending that the court did not err in sustaining its Special Exceptions Nos. 1, 2, 3, 4, and 5 which we have hereinabove set out.

[1] We do not believe the court erred in sustaining the first five of the special exceptions and in overruling appellee's plea to the jurisdiction of the court, and appellants declining to amend, dismissed the cause of action.

The first special exception was that plaintiffs' suit was not filed in the time and manner provided by House Bill 309 (Article 842g, V.A.C.S.) enacted in 1951, providing that suit shall be brought within two years from the date of the Act, and plaintiffs' cause of action, if any, was barred by the express terms of the statute, and special exception No. 2 was that plaintiffs' suit was not filed in the time provided by Article 5527, V.A.C.S., the four year statute of limitation.

In 1951 the Legislature passed House Bill 309, codified as Article 842g, which in brief and in part provided that lawful holders of bonds issued under the Act of April 8, 1861, called Texian Loan, consent to sue on said bonds, principal and interest, and providing that the statute of limitations was not tolled, or admission of liability, and providing that suit be brought in Travis County within two years from date of the Act.

This bill became effective September 7, 1951. Appellants' suit was filed July 31, 1957, and the trial court held that the bill applied to appellants and the bonds sued on, and that their suit was barred as a matter of law.

The defense of limitation is available to the State.

Callahan v. *Giles*, 137 Tex. 571, 155 S.W.2d 793, and cases cited therein; *Railroad Commission* v. *Beacon Oil & Refining Co.*, Tex.Civ.App., 227 S.W.2d 293, er. ref., N.R.E., and authorities and cases cited therein.

Appellants' cause of action is founded on a contract with the State and such cause, if such there be, accrued on July 1, 1877, and suit was filed approximately 80 years later and is barred by the four year statute of limitation. Section 6 of House Bill 309 provided that the statute of limitations was not tolled, or such cause revived if same was barred by the statute of limitations.

In relinquishing its sovereign immunity to be sued the State may attach such conditions to the right as it deems appropriate.

38 Tex. Jur., Section 35, p. 856.

[2] House Concurrent Resolution No. 44, by the terms of which appellants seek to maintain their suit and avoid the application of general law by resolution is not effective for this purpose, as statutes cannot be amended in this manner. An amendment of a law must be re-enacted and cannot be amended by a resolution.

Caples v. *Cole*, 129 Tex. 370, 102 S.W.2d 173, 104 S.W.2d 3; *State Highway Dept.* v. *Gorham*, 139 Tex. 361, 162 S.W.2d 934; *Humble Oil & Refining Co.* v. *State*, Tex.Civ.App., 104 S.W.2d 174, er. ref.

Concurrent Resolution No. 44, under which this suit was filed, provides:

"Whereas, The Fifty-second Legislature of the State of Texas duly enacted an Act set forth as House Bill No. 309, Chapter 392, Page 677 of the 1951 General Laws of Texas, which Act is also Article 842g of Vernon's Texas Civil Statutes wherein the State authorized suit on bonds comprising said Texian Loan to a limited extent, that is for the moneys alleged to be in unpaid principal and interest on said bonds, prorated to the extent only of the amount reimbursed to the State of Texas by the United States Government, which the said Mrs. M. B Buford and said Administrator contend did not apply to the bonds they hold and which they are unable to prove, such a requirement placing a burden on the bondholders that was no part of the original obligation and therefore said parties were prevented from asserting their rights as bondholders under said Article 842g; and

"Whereas, The Fifty-third Legislature, at its Regular Session, by House Concurrent Resolution No. 118, duly adopted by the House and Senate of the Texas Legislature at said Session and approved June 8, 1953, did authorize the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, to file suit on the bonds just above referred to, but specified in said Resolution that said suit should be tried 'in like manner as similar suits instituted against private corporation are tried' which provision is unlawful and has been held to invalidate such Resolutions in other cases by the Supreme Court of Texas, and therefore, the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, have not been able to properly maintain their suit, and it is the intention of the State of Texas to give said proper parties the opportunity to press their suit as bondholders without the limitations referred to, this Resolution being in addition to said Act and said Resolution, and any and all other Acts and Resolutions pertaining to the subject matter hereof; now, therefore, be it

"Resolved * * * That the said Mrs. M. B. Buford, her heirs, executors, administrators and assigns and George B. Lindler, Administrator of the Estate of Jeff Chapman, deceased, and his successors are hereby authorized to file, prosecute and maintain a suit * * *

"Resolved, That the permission and authority granted by this Resolution be in nowise restricted or circumscribed except by the terms hereof; and, be it further

"Resolved, That the sole purpose of this Resolution is to grant permission to the aforesaid Mrs. M. B. Buford, her heirs, executors, administrators and assigns and/or George B. Lindler, Administrator, to bring suit against the State of Texas, and, no admission of liability of the State or of any fact is made in anyway by the passage of this Resolution, and it is specifically provided that the facts upon which recovery is sought must be proved in court as in other civil cases."

Special Exceptions Nos. 3 and 4 are directed to laches and estoppel.

It appears from the pleadings that no demand was made for payment of the bonds for more than 75 years and they are, as a matter of law, guilty of laches and are estopped from prosecuting this suit.

Generally laches is a defensive plea but as above stated, the petition shows such a long delay in making demand for the payment of the bonds, and the plea of laches may be raised by special exception.

In Texas Jurisprudence, 10 Year Supplement, Vol. 6, paragraph 14a (New), p. 758, it is stated:

"Effect of Court Rule.—Rule 94 of the Texas Rules of Civil Procedure provides that the defense of laches

'shall be set forth affirmatively.' This rule does not preclude the raising of the defense by special exception where it affirmatively appears from the allegations of the petition that the defense of laches is available. * * *"

Power v. *State*, 41 Tex. 102; *Culver* v. *Pickens*, 142 Tex. 87, 176 S.W.2d 167.

In 27 Tex.Jur., Secs. 2-3, pp. 15-18, laches and stale demand are discussed.

Francis R. Lubbock, while Governor, signed the bonds on January 1, 1862, and was elected State Treasurer in 1878, serving until January, 1891, and was familiar with the bonds and the maturity date, and if the holders of the bonds thought that they had a valid claim against the State, it may be assumed that the bonds would have been presented for payment, and if payment had been wrongfully refused, the holders had the remedy of mandamus.

Article 1735, V.A.C.S.

The Legislature met every two years subsequent to the maturity date of the bonds and if the bonds were valid, they could have paid them or made provisions for payment.

Then too, in Governor Hubbard's initial message to the 16th Legislature on the State's finances stating the bonded indebtedness, these bonds are not mentioned but a list of other bonds is given.

Appendix "B", General Laws of Texas, 1876, pp. 40-43.

Since we are affirming the judgment of the court in sustaining appellee's special exceptions 1, 2, 3, and 4 and dismissing this cause, we do not find it necessary to consider or decide whether the Constitutions of 1866 and 1869 invalidating these bonds were right or wrong, or

whether any contract has been impaired, or to decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted, and its application to these bonds.

The judgment of the Trial Court is affirmed.

Affirmed.

HUGHES, Justice (concurring).

I withdraw my former concurring opinion and substitute therefor the following:

Secs. 1 and 2, Art. 842g, V.A.C.S., provide:

"Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

"Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act."[1]

Appellants construe the latter portion of this Section as meaning "that the bondholders could recover *only* to the extent of the actual reimbursement, properly prorated." They then contend that they could not have recovered anything in a suit brought under that statute "* * * because the United States government never reimbursed the State of Texas for the bonds in question. * * *" This fact, no re-

1. Appellants' suit was filed July 31, 1957.

imbursement, they say is true as a matter of law since there is in existence no Act of Congress authorizing such reimbursement.

The State places a different construction on the latter portion of Sec. 1, *supra*, as shown by the following quotation from its brief:

> "But Appellants say that House Bill 309, the General Law giving all holders of bonds, such as Appellants in this case, the right to sue upon said bonds, does not apply to them or their bonds. They advance the theory that the phrase 'prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States Government for the principal and interest on said bonds' excludes them and their bonds from the application of House Bill 309, the General Law. The argument is wholly untenable. We think it clear that the Legislature meant that if any of the bonds had been reimbursed to the State of Texas by the Federal Government only to that extent would the bonds be subject to a proration. In other words, the State's liability would be reduced to the extent of such proration. Of course, if there were no bonds reimbursed by the Federal Government, this provision would have no application. If Appellants were entitled to recovery at all, they would be entitled to full recovery in the absence of a proration. If a proration were shown it would be borne in common by all the bond holders, and not merely by Appellants' bonds."

I do not agree with either construction. In my opinion the proration provision of this Article constitutes a limitation on the amount of money which the Legislature would be authorized to appropriate for the payment of judgments obtained in suits filed under the Act and that it in no way lessened the right or duty of the holders of Texian bonds to bring suit within the time prescribed for

the purpose of establishing the amount of principal and interest due on the bonds held by the owner.

The only cause of action which the holders of these bonds had was a suit to establish ownership of bonds and the amount due thereon. Money judgments against the State are not enforced by ordinary judicial process. Their payment is left up to legislative discretion and when made is customarily by an appropriation of money for that purpose.

In view of this it is my opinion that the right to sue provisions of Art. 842g are separate, distinct and severable from its proration or payment restrictions. See *National Biscuit Company* v. *State*, 134 Tex. 293, 135 S.W.2d 687, where an invalid appropriation to pay judgments obtained contained in a right to sue resolution was held severable.

[1] Appellant's cause of action accrued when consent to be sued was authorized by the State. *State* v. *Elliott*, Tex.Civ.App., 212 S.W. 695, writ refused. This is true, in my opinion, regardless of the attitude of the State towards payment of any judgment which might be obtained. The usual case is where the State has not indicated its policy towards payment. Litigants proceed on faith believing that the State will pay its just debts. Here the most that appears is that the State was mistaken in stating that it had received partial reimbursement from the United States Government for these bonds and restricting payment accordingly. The attitude of State on becoming aware of this mistake is clearly shown by the subsequent legislative history of this matter, referred to in the Court's opinion herein. H.C.R. 118, p. 1155, Acts 53rd Leg., Reg.Sess. 1953; H.C.R. 44, p. 1585, Acts 55th Leg., Reg.Sess. 1957. These resolutions, in my opinion, indicate that the Legislature would have authorized payment of judgments obtained under

Art. 842g and would have withdrawn the restrictions which that Act imposed on payment. However this may be it is my opinion that appellants should have timely proceeded under Art. 842g, obtained judgment and thereafter sought its payment through legislative processes.

I realize that this construction of the statute is somewhat strained but it is supported upon the following general principles:

> "A statute will not be construed so as to ascribe to the Legislature an intention of doing any unjust thing by its enactment, or of causing confusion thereby, if the statute is reasonably susceptible of a construction showing the Legislature's intention to have been otherwise." *State Highway Department* v. *Gorham*, 139 Tex. 361, 162 S.W.2d 934, 936.

> "* * * in case of conflict between two sections of an act, one section will not be held to repeal another unless such is the only construction that is permitted." Vol. 39 Tex.Jur., p. 142.

> "* * * in construing a statute it frequently happens that a word or phrase must be added to, or eliminated from, a particular part or section in order to carry out the manifest intent, as disclosed by the entire enactment. In such circumstances, a word or phrase may be supplied or one term may be substituted for another, and repugnant superfluous or useless words and expressions may be disregarded." Vol. 39 Tex.Jur. p. 185.

My construction of the statute would be manifest if the words "payment to be" are inserted immediately before the word "prorated." This insertion is plainly justified under the above authorities.

Furthermore the ineffectiveness of this statute, if so it be, does not appear upon its face and is made to appear only upon the production of evidence.

When appellants say that, as a matter of law, they could not have recovered anything in a suit brought under Art. 842g I presume they mean that the court trying such suit would have found from his own judicial knowledge that no Act of Congress authorized reimbursement of these bonds.[2]

Judicial notice merely supplants the necessity of producing evidence of the fact to be established. In *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 729, 81 L. Ed. 1093[3] the Court said:

> "Moreover, notice [judicial] even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." Citing Wigmore, Evidence, par. 2567, 1 Greenleaf, Evidence, 16th ed., p. 18. See also 31 C.J.S., Evidence, § 13, p. 519.

Since appellants did not try out the issues of law and fact which they now raise, in a timely suit brought under Art. 842g, *supra*, where such issues[4] could have been adjudicated it is my opinion that the cause of action asserted here is barred by the terms of such statute unless validly waived by the State.

---

2. Courts take judicial notice of the nonexistence of a public Act of Congress. *Ofield* v. *National Ben. Life Ins. Co.*, Tex.Civ. App., Texarkana, 293 S.W. 271.

3. This case also states that such evidence may be disputed. The validity of this statement is questioned by eminent authority. See Vol. 1, Sec. 154, McCormick and Ray, Texas Law of Evidence, 2nd ed.

4. Other possible issues which could have been there litigated are (1) The validity of the proration provision if its effect was to nullify the consent to sue (2) the effect to be given the failure to mention the proration provision in the Caption of the Act.

The fact that the period of limitation has run against assertion of a claim against the State would not prevent the State from waiving the bar of the statute. I quote from *Caldwell County* v. *Harbert*, 68 Tex. 321, loc. cit. 328, 4 S.W. 607, 612:

> "As before said, there can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it after the lapse of such time as would ordinarily bar the claim. That in favor of and against counties, limitation will run in the absence of some statute to the contrary, does not affect the question. The power of the state to recognize and pay a claim against itself after the lapse of any period of time can not be questioned on any constitutional ground; and the power of the legislature over counties in reference to such matters as only affect them as municipal subdivisions of the state through which local affairs are conducted, is just as broad."

See also *Limestone County* v. *Robbins*, 120 Tex. 341, 38 S.W.2d 580; 53 C.J.S., Limitations of Actions, § 24, p. 959.

[2] If Art. 842g and the two concurrent legislative resolutions were of the same dignity it could be plausibly and convincingly argued, to me, that appellants' suit was not barred by limitations. Art. 842g however is a general law which cannot be amended or repealed by a concurrent legislative resolution. *Caples* v. *Cole*, 129 Tex. 370, 102 S.W.2d 173, 104 SW.2d 3; *Humble Oil & Refining Company* v. *State*, Tex.Civ.App. Austin, 104 S.W.2d 174, writ ref.

Since Art. 842g was invoked by the State as a defense in this suit it is my opinion that the Trial Court was bound to enforce this general law and to disregard the resolutions of the Legislature which were in conflict with it.

I express no opinion on any other question presented.

GRAY, Justice (concurring).

[1, 2] It is with some difficulty that I agree with the conclusion reached by the majority that Art. 842g bars a recovery by appellants. I do not agree with Chief Justice ARCHER that the defenses of laches and stale demand are available to the State here. I do agree that the issue of whether the cause of action is barred must be decided by the application of Art. 842g, and the Concurrent Resolution wherein the Legislature expressed its intent to relieve appellants of burdens imposed by Art. 842g. It cannot be questioned that the Legislature had the authority to suspend this law. Art. 1, Sec. 28, Texas Constitution. However Justice Hughes has held, correctly I think, that the concurrent resolution was not effective to suspend Art. 842g, a general law.

The Legislature had the right to prescribe the terms and conditions of the right to sue the State. 38 Tex.Jur., p. 660. Sec. 59. It also had authority to, but did not, prescribe the period of limitation applicable to the cause of action by allowing a reasonable time in which to bring the suit. 28 Tex.Jur., pp. 80 and 81, Secs. 6 and 7. Art. 842g meets these requirements by giving parties two years within which to bring their suit. Thus a period within which the remedy must be pursued was fixed and that period was complete before this suit was filed. Art. 842g and the joint resolution deal with the same general subject [that is the bonds in question] and it is our duty to harmonize them if possible. 39 Tex.Jur., pp. 252 and 253, Secs. 134 and 135. The joint resolution merely gave appellants a right to sue but it did not provide a remedy.

Unquestionably the joint resolution gave appellants the right to sue and thus the meaning and application of

the general rule that their cause of action then accrued is presented. To me it appears that the only answer to such inquiry is that appellants' right to sue the State accrued with the right of all holders of Texian bonds under Art. 842g. However that right expired after two years and appellants were then without the right to sue the State and test the validity of their claim under any law as well as to have determined the question whether Art. 842g was a valid enactment and whether its provisions were applicable to their cause of action. We all agree that it was a valid statute and that its provisions are applicable to appellants' alleged cause of action. This being true and the time provided in the statute for bringing suit having expired the jurisdiction of the court to hear the cause had ceased. *Texas Mexican Ry. Co.* v. *Jarvis*, 80 Tex. 456, 15 S.W. 1089, 1091. Appellants then could not sue the State and test the statute, Art. 842g, except by consent as given by the joint resolution. However since their cause of action accrued under the general law (Art. 842g) a recovery is barred by the State's plea of four years limitation.

My stated conclusions make it unnecessary to express my opinion on matters not specifically mentioned herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 293

MRS. M. B. BUFORD, ET AL.,
Petitioners,

vs.

THE STATE OF TEXAS,
Respondent.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Respondent, the State of Texas, and respectfully files this its brief in opposition to the petition for writ of certiorari.

Statement of The Case

This case is a suit brought by Petitioners in the District Court of Travis County, Texas, 98th Judicial District, against the State of Texas, to re-

cover judgment on forty-six (46) bonds of the denomination of One Thousand Dollars ($1,000.00) each, or a total of Forty-six Thousand Dollars ($46,000.00), plus eight percent (8%) interest from January 1, 1862 to July 1, 1877.

Texas seceded from the Union on February 28, 1861. The bonds sued upon by Petitioners in this case constitute a part of an issue of One Million Dollars ($1,000,000.00) issued under an Act of the Legislature of April 8, 1861, and said bonds were issued by the State of Texas as a member of the Confederate States dated January 1, 1862, except bond No. 5 dated March 25, 1862, and under the Constitution of 1861 governing Texas as a member of the Confederacy. A copy of the bonds is attached to Petitioners' Petition filed in the trial court, and all the bonds are of like tenor.

Petitioners purport to file their suit under House Concurrent Resolution No. 44 of the 55th Legislature of the State of Texas, approved June 11, 1957.

The facts of this case are stated in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, styled *Mrs. M. B. Buford, et al. v. The State of Texas*, 322 S. W. 2d 366, which opinion, including the two concurring opinions, is set forth in appendix attached to this brief and designated as Appendix A.

Proceedings Below

The District Court of Travis County, Texas, 98th Judicial District, entered a judgment sustaining Respondent's Special Exceptions Nos. 1, 2, 3, 4,

and 5, and overruled Petitioners' Special Exceptions. Upon Petitioners' refusal to amend, the District Court dismissed the cause.

The judgment of the Court of Civil Appeals affirmed the judgment of the District Court and denied Petitioners' motion for rehearing. The Supreme Court of Texas denied Petitioners' application for writ of error and overruled Petitioners' motion for rehearing.

Jurisdiction

It is questioned by Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States. There is but one question: whether this Court will exercise its jurisdiction to decide whether the State Court of last resort has correctly interpreted and applied State laws.

Questions Presented

1. Will the Supreme Court of the United States grant certiorari in this case for the reason that Petitioners have asserted that the Fourteenth Amendment to the Constitution of the United States was not lawfully proposed and adopted?

2. Is Section 10, Article I of the United States Constitution, prohibiting the impairment of the obligations of contracts, involved in this case?; and

3. Is the construction of the Acts of the 47th Congress, Chapter 41, Section 1, approved June 27, 1882, Volume 22, United States Statutes at Large, page 111, with reference to reimbursement by the Federal Government of certain obligations of the States, involved in this case?

In summary, the sole question involved for this Court to decide is whether the judgment of the State Court below rests on adequate and independent grounds, without reference to the foregoing contentions of Petitioners of alleged federal questions.

Statutes Involved

The statutes involved are produced in the Appendix to this brief. (Appendix B and C)

Argument

As previously noted, this case was instituted by Petitioners to recover on certain so-called "Texian Loan Bonds" issued by the State of Texas after secession, and while Texas was a member of the Confederacy. The special exceptions filed by Respondent as defendant in the trial court are set out in the opinion of the Court of Civil Appeals attached as an appendix to this answer and brief (Appendix A), and are found on pages 18 to 21.

The first of these special exceptions is that Petitioners' suit was not filed in the time and manner provided by law, namely House Bill 309, Chapter 392 of the Acts of the 52nd Legislature, Regular Session, 1951, page 677 (Article 842(g), Vernon's

Texas Civil Statutes (Appendix B). For convenience we shall hereafter refer to this statute as House Bill 309. The second special exception was that Petitioners' suit was not filed in the time and manner provided by Article 5527, Vernon's Texas Civil Statutes, which provides in part that suits must be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterwards, if the action is for debt evidenced by or founded upon any contract in writing. (Appendix C). The third and fourth special exceptions set up laches and stale demand. The fifth special exception, while correctly sustained, is not important in the determination of the merits of this application, hence not further noted. The Court of Civil Appeals in this case stated affirmativly that it affirmed the judgment of the trial court sustaining Respondent's special exceptions 1, 2, 3, and 4, and dismissing the cause (Petitioners refused to amend), and the Court stated that it did not find it necessary to consider or decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted or if any contract was impaired. (Appendix A, p. 29).

In 1951 the Legislature passed House Bill 309, codified in Vernon's Texas Civil Statutes as Article 842(g), which provided that all lawful holders of bonds issued under the Act of April 8, 1861, called "Texian Loan Bonds" might sue on said bonds for principal and interest within two years from the date of the Act. This Act further provided that the statute of limitations was not tolled nor any liability admitted, and that suit *shall* be brought in

Travis County within two years from the date of the Act. (Emphases throughout supplied unless otherwise indicated). (See Sections 2, 6 and 7 of House Bill 309, Appendix B). This Act, that is, House Bill 309, giving consent to all the bondholders to sue, became effective September 7, 1951. Petitioners' suit was filed July 31, 1957, nearly six years subsequent to the effective date of the Act. This affirmatively appears from the petition.

It is the law of this State that the defense of limitation is available to the State. *Callahan v. Giles*, 137 Tex. 571, 155 S.W. 2d 793, and cases cited therein; *Railroad Commission v. Beacon Oil & Refining Co.*, Tex. Civ. App., 227 S.W. 2d 293 error ref., n.r.e., and authorities and cases cited therein.

Moreover, Petitioners' cause of action, if any they had, was founded upon a contract in writing with the State. This affirmatively appears from the petition. The bonds matured on July 1, 1877, and Petitioners' suit was not filed until approximately 80 years later, hence is barred by the four-year statute of limitations of the State of Texas, and this was sustained by the State Court. This four-year statute of limitations is set out as Appendix C. Section 6 of House Bill 309, the general law, provides that the statute of limitations was not tolled or such cause revived if same was barred by the statute of limitations (House Bill 309, Appendix, B, page 38).

In relinquishing its sovereign immunity to be sued, the State may attach such conditions to the right as it deems appropriate. 38 Tex. Jur., Section 59, p. 660. *Treasurer v. Wygall*, 46 Tex. 447; *Hosner*

v. DeYoung, 1 Tex. 764; *State v. Elliott* (Civ.App.) 212 S.W. 695, error refused; *State v. Gulf Oil Corp.* (Civ.App. 1942); 166 S.W. 2d 197. (No writ history). Petitioners were obliged to file their suit, as the Legislature prescribed in House Bill 309, in Travis County, and within two (2) years from the effective date of the Act, September 7, 1951. They ultimately filed their suit in Travis County, but completely ignored the condition prescribed by the Legislature in House Bill 309, the general law, that it must be filed within two (2) years from the effective date of the Act, September 7, 1951. Whether intentionally or negligently, it makes no difference, the result is the same.

Petitioners seek to avoid the application of general law by Resolution, namely House Concurrent Resolution No. 44 (Appendix A, pp. 26-27), under which they purport to file their suit. The Courts of this State have held that a Resolution is not effective to repeal, modify, or amend a law. *Caples v. Cole*, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *State Highway Dept. v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934; *Humble Oil & Refining Co. v. State*, Tex. Civ. App., 104 S.W. 2d 174, error ref.

The State Court held that Petitioners were bound by the terms of House Bill 309, the general law, and Article 5527, Vernon's Texas Civil Statutes, also a general law, and that these general laws applied to Petitioners and their bonds. The Court of Civil Appeals affirmed this holding and judgment, and the Supreme Court of Texas refused writ of error. The Supreme Court of the United States has consistently held that the construction of State laws

is the exclusive responsibility of State Courts. *Knights of Pythias v. Meyer*, 265 U.S. 30, 32; *Hotel and R. Employee's International Alliance v. Wisconsin Employment Relations Bd.*, 315 U.S. 437, 438; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680; *Morehead v. New York*, 298 U.S. 587, 609; *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 477; *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 633.

The application of laches and statutes of limitation by State Courts does not present a Federal question. *Preston v. Chicago, Ill.* 1913, 33 S.Ct. 177, 226 U.S. 447, 57 L.Ed. 293; *Seneca Nation v. Christy*, N.Y. 1896, 16 S.Ct. 828, 162, U.S. 28, 40 L.Ed. 970; *Harrison v. Myer*, La. 1876, 92 U.S. 111, 23 L. Ed. 606; *Corothers v. Mayer*, Mont. 1896, 17 S. Ct. 106, 164 U.S. 325, 41 L.Ed. 453; *Great Western Tel. Co. v. Purdy*, Iowa 1896, 16 S.Ct. 810, 162 U.S. 329, 40 .Ed. 986.

We turn now more specifically to laches and stale demand raised by Respondent's special exceptions 3 and 4. The Supreme Court of Texas, in the case of *Power v. State*, 41 Tex. 102, in passing upon a claim asserted against the State, held that a delay of 27 years in asserting the claim was barred by laches and stale demand as a matter of law. The last paragraph of the Court's opinion is brief, and we quote it:

> "We think no sufficient excuse is shown for the great delay in the prosecution of this claim, and that, even if the Act of 1846 were held to cure the delay up to that time, the lapse of

twenty-seven years after that date before filing this suit *is fatal to the case*, according to the *most liberal rules on that subject recognized in this court.*"

If a delay of 27 years is fatal, then what can be said in support of a delay of 80 years? To state the question is to answer it. It is elementary, and needs no citation of authority to support it, that the law favors the diligent and gives no comfort to the slothful and dilatory. Long delay in asserting a claim, whether it be against the State or private individuals, is indicative that the claim is without merit and unenforceable. 27 Tex.Jur., pages 15-18, where laches and stale demand are discussed.

It is significant to note that the Court of Civil Appeals in this case said:

> "If the holders of the bonds thought that they had a valid claim against the State, it may be assumed that the bonds would have been presented for payment and if payment had been wrongfully refused, the holders had the remedy of mandamus." (Appendix A, page 28 and 29).

Notwithstanding the existence of the remedy of mandamus available to Petitioners and their predecessors in title to the bonds for three quarters of a century, they ignored this remedy. The remedy of mandamus in the State of Texas in a proper case is simple. The Supreme Court of Texas has original jurisdiction under Article 1735, Vernon's Texas Civil Statutes, in actions against the executive officers of the State, except the Governor. The Comptroller of Public Accounts and the State Treasurer

are executive officers of the State of Texas under the Constitution. As stated in the opinion of the Court of Civil Appeals in this case, if Petitioners or their predecessors in title thought they had valid bonds they could have presented them to the State Treasurer for payment and, if wrongfully refused, mandamus would lie against him to require payment. This remedy has been completely ignored since the maturity of the bonds in 1877.

If the holders of these bonds, whoever they may have been, consider them valid obligations of the State, they should have asserted their claim at the time of their maturity and default, July 1, 1877, or within a reasonable time thereafter and not 80 years later. If they had valid bonds, as pointed out by the Court of Civil Appeals, the remedy of mandamus was available to them. Petitioners contention of the unavailability of a remedy is wholly untenable. The fiscal obligations of the states is not a casual matter with them. Sound public policy demands that they be kept current. It is hardly conceivable that there is presently living any person with any personal knowledge surrounding issues of these old bonds. Records are lost or become fragmentary and obscure over a period of 80 years. These are elements that compel the prompt assertion of claims, or lose the right by laches and stale demand. There could scarcely be conceived a case more appropriate for the application of the doctrine of laches and stale demand than is present in this case.

The bonds involved here, on which Petitioners seek to recover, were issued nearly a century ago

by the State of Texas as a State of the Confederacy, and matured by their express terms 80 years before Petitioners filed their suit.

It is presumed that the State is always ready to pay its legal obligations or make provision therefor. *Bankers Bond Co. v. Buckham*, 97 S.W. 2d 596 (Court of Appeals, Kentucky). The states are jealous of their credit, as indeed they should be. The Legislature met every two years and in many special sessions subsequent to the maturity of these bonds, July 1, 1877. If the Legislature had considered them valid it could have, and no doubt would have, paid them or made provision therefor long ago. No Legislature or Governor of the State at or subsequent to the maturity of these bonds has ever taken any recognition of them until the Legislature passed House Bill 309 in 1951 which, in effect, said to the holders of these bonds, notwithstanding their antiquity, you may sue upon them if you think they are valid obligations of the State, but this you must do within two years from the effective date of the Act, which Petitioners completely ignored. This they were not privileged to do over the State's exception.

Reverting to the non-recognition of these bonds by the Legislature and the Governors, and the absence of any assertion of a claim against the State upon them for a period of 80 years, it is significant to note that Governor Hubbard, who succeeded Governor Coke as Governor, on December 1, 1876 when Governor Coke resigned to enter the United States Senate, made a statement of the outstanding bonded indebtedness of the State in his initial message to the Legislature. He did not mention these bonds,

but mentioned others, and made recommendation to the Legislature to refund all bonds that matured in 1876 and 1877, which would embrace the date of the maturity of Petitioners' bonds, July 1, 1877. The Legislature obeyed Governor Hubbard's recommendation to refund all State bonds maturing in 1876 and 1877, but made no provision for the bonds authorized by the Act of April 8, 1861, of which Petitioners' bonds are a part. All of this is reflected by the public laws and records of this State. Thus, it is quite evident that neither the Governor nor the Legislature, contemporaneously with the maturity of these bonds, recognized them as valid obligations of the State. We think it must be concluded they were considered invalid and worthless.

Petitioners also seek to avoid the terms of House Bill 309 because of the phrase appearing therein, "prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States Government for the principal and interest on said bonds," contending that this phrase renders the Act inapplicable to them and their bonds. The State Court held otherwise, and this construction and application by the State Court will be followed by the Supreme Court of the United States as held in the decisions of the Supreme Court of the United States heretofore referred to. Moreover, as Justices Gray and Hughes observed in their concurring opinions, Petitioners could have had their contention in this respect judicially determined if they had timely filed their suit under House Bill 309 (Article 842 (g), Vernon's Texas Civil Statutes), which they did not do.

Furthermore, this phrase could be severed and laid aside, without in any manner, impairing the consent to sue *Martin v. Sheppard*, 145 Tex. 639, 201 S.W. 2d 810.

Moreover the act of Congress relied upon by petitioners for federal jurisdiction in this case, namely: Chapter 241, Sec. 1, of the Acts of the 47th Congress approved June 27, 1882, 22, U. S. Statutes at Large, page 111, affords no grounds for the assertion of any federal right in this case. Petitioners contention seems to be that because this act of Congress authorizing certain reimbursements to the states for Indian deprivations is silent on any other reimbursements by the federal government to the states, and that there is no other federal statute authorizing reimbursement, that this gives rise to a federal question. Petitioners do not attack the validity of House Bill 309, (Art. 842g), but merely say that there is no federal statute authorizing reimbursement by the federal government as to the bonds sued upon by petitioners in this case. Where the question is not as to the validity, but as to existence of an authority under the United States, a federal question is not presented. *Millingar v. Hartupee*, Pa. 1868, 6 Wall. 258, 18 L.Ed. 829. See also, *Walsh v. Columbus, etc., R. Co.*, Ohio 1900, 20 S.Ct. 393, 176 U.S. 469, 44 L.Ed. 548; *Hamblin v. Western Land Co.*, Iowa 1893, 13 S.Ct. 353, 147 U.S. 531, 37 L.Ed. 267; *New Orleans v. New Orleans Water Works Co.*, La. 1891, 12 S.Ct. 142, 142 U.S. 79, 35 L.Ed. 943.

Petitioners' contention with respect to the sufficiency of the submission and adoption of the Four-

teenth Amendment to the Federal Constitution and its application to this case is so far-fetched, obscure, and non-colorable, that it does not merit discussion. Suffice it to say that Petitioners complaint against the Fourteenth Amendment to the Federal Constitution should be addressed to the legislative branch of the Government which has authority and power in the premises, instead of the judicial branch which has none. As the Court of Civil Appeals in its opinion in this case (Appendix A), correctly and aptly said, "It is not necessary to consider or decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted or whether any contract had been impaired as provided in the Federal Constitution by the invalidation of these bonds by the Texas Constitution of 1866 and 1869. The Court of Civil Appeals in this case based its decision and judgment upon Respondent's special exceptions numbered 1, 2, 3 and 4, which were by the trial court sustained; any one amply supports the judgment. Upon Petitioners' refusal to amend the cause was dismissed, as it should have been.

These special exceptions and the decision and judgment of the State Court are based upon the local or State law of the State of Texas, and rest upon adequate and independent grounds, hence will not be reviewed by the Supreme Court of the United States. *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117, 125; *Klinger v. State of Missouri*, 13 Wall. U.S. 257, 263; *Murdock v. Memphis*, 20 Wall. U.S. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise*

Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210.

Moreover, as heretofore stated, the proper construction, interpretation, and effect of a State statute, being a question of local law and not Federal law, the judgment of the State Court thereon will not be reviewed by the Supreme Court of the United States. See authorities cited on page 8.

Applying these principles to this case, the judgment of the State Court rests on adequate and independent State grounds in that the State Court has entered judgment, the effect of which is to hold that Petitioners' suit is barred by the terms of House Bill 309, Article 842(g), Vernon's Texas Civil Statutes, and Article 5527, Vernon's Texas Civil Statutes, and by laches and stale demand, all of which embrace, exclusively, State or local law, and the construction and application thereof will be followed by the United States Supreme Court.

We therefore respectfully submit that the judgment of the State Court rests on adequate and independent State grounds, and that the proper construction, interpretation and effect of State statutes and the decisions of State Courts as applied to this case is not subject to review by the Supreme Court of the United States.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Court of Civil Appeals for the Third

Supreme Judicial District of Texas, in which the Supreme Court of Texas refused application for writ of error, should be by this Court denied.

Respectfully submitted,

WILL WILSON
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Service

I, HOWARD W. MAYS, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Answer and Brief has been forwarded by the United States Air Mail, postage prepaid, to Petitioners' attorneys, Mr. Dan Moody, Capital National Bank Building, Austin, Texas; Mr. Wharton Weems, Esperson Building, Houston 2, Texas; and Mr. Fred W. Moore, 1812 South Coast Building, Houston 2, Texas.

HOWARD W. MAYS
Assistant Attorney General
of Texas

Appendix A

Mrs. M. B. BUFORD et al., Appellants,

v.

STATE of Texas, Appellee.

No. 10631.

Court of Civil Appeals of Texas.

Austin.

Jan. 28, 1959.

Rehearing Denied March 4, 1959.

ARCHER, Chief Justice.

This is an appeal from an order of the District Court sustaining defendant's special exceptions numbered 1, 2, 3, 4 and 5, and overruling the special exceptions of plaintiffs. We will hereinafter set out the several exceptions in more detail.

This suit is on forty six One Thousand Dollar Texian Loan Bearer Bonds issued by the State of Texas under an Act of the Legislature, approved April 8, 1861, the bonds being payable to bearer July 1, 1877, with interest at 8% per annum from July 1, 1862 until paid. The bonds are all dated January 1, 1862, except bond No. 5 which is dated March 25, 1862.

Appellants as plaintiffs alleged that they are the owners and holders of forty six One Thousand Dol-

lar Texian Loan Bearer Bonds issued under an Act of the Texas Legislature, approved April 8, 1861, payable and due July 1877, with interest coupons for January 1, 1863, July 1, 1863, January 1, 1864, July 1, 1864 and January 1, 1865 which were clipped; that all the bonds were duly registered by the State Comptroller and the State is liable for the payment of the bonds.

That by House Concurrent Resolution No. 44, passed by the 55th Legislature, Regular Session, 1957, p. 1585, approved by the Governor and filed with the Secretary of State June 12, 1957, plaintiffs were authorized to file this suit at any time within two years from the effective date of the resolution, and that the suit is limited for the principal amount of said bonds and interest to the maturity date of the bonds and prayed for judgment.

The Special Exceptions filed by the State, as defendant are:

> "(1) * * * that Plaintiffs' suit was not filed in the time and manner provided by law; namely; namely, House Bill 309, Chapter 392 of the Acts of the 52nd Legislature, Regular Session, 1951, Page 677 (Article 842g, Vernon's Civil Statutes), which provides, in part, as follows:
>
> "'Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds * * *

"'Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act.' * * *

"(2) The Defendant, State of Texas, excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs' suit was not filed in the time and manner provided by Article 5527, Vernon's Civil Statutes, which provides, in part, as follows:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"'1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.'

"and that Plaintiffs' suit and cause of action, if any they have, was at the time of filing of Plaintiffs' original petition barred by the express terms of said statute in that it was not filed within four years from the date the same accrued.

"(3) The Defendant, State of Texas, excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs and any under whom they may claim have silently stood by and have wholly failed either to give notice or make demand upon the Defendants, State of Texas, or any officer or agent thereof charged with any official duty in connection with said bonds for approximately 75 years, and nowhere do Plaintiffs allege that said bonds were ever presented for payment at maturity or thereafter to the State of Texas or any officer or agent thereof charged with any official duty in connection with said bonds, and under

the circumstances Plaintiffs are guilty of laches and are not now entitled to prosecute their claim for recovery upon said bonds; to render any judgment therefor and to pay the same would be contrary to and in violation of the public policy of this State, the presumption being that the State of Texas will pay promptly all valid and legal obligations of the State or make provisions therefor.

"(4) The Defendant, State of Texas, specially excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs are now endeavoring to enforce a stale demand against the State of Texas, it affirmatively appearing that said bonds matured more than 75 years past and Plaintiffs are now in law and equity estopped from presenting and prosecuting said suit against the State of Texas upon said stale demand, the presumption being that if valid they would have long since been paid or provision made therefor.

"Wherefore, the Defendant, State of Texas, prays that the foregoing exceptions and each of them be sustained and this suit be by the Court dismissed.

"(5) Without waiving the foregoing exceptions the Defendant specially excepts to the sufficiency of Plaintiffs' petition in that it nowhere alleges when and how and under what circumstances Jeff Chapman, under whom Plaintiffs purport to hold said bonds, acquired or came into possession of them. In this connection the Defendant, State of Texas, will show the Court that Jeff Chapman was not born until several years after the maturity date of said bonds. Without this information, which is particularly within the knowledge of Plaintiffs,

the Defendant is not able to properly prepare for the trial of this case. Plaintiffs should, therefore, be required to amend their pleading to disclose said information, failing in which Plaintiffs' suit should be dismissed."

An answer subject to the plea to the jurisdiction and special exceptions, was a general denial and that Concurrent Resolution No. 44 is unconstitutional and void and violates Section 3 of Article I of the Constitution, Vernon's Ann. St.; and suit was not brought in accordance with House Bill No. 309, and is barred by the four year statute of limitation and that the bonds were issued after the State had seceded and was a member of the Confederacy and for the purpose of financing the war, and pled Section 4 of the Fourteenth Amendment. Further answer was that Ordinance No. 2, 5 Gammel Laws 887 (1898) provided in part that all debts created in aid of the late war were declared void, and that the Legislature was forbidden to make any provision for the payment of any debts so contracted from the 28th of January, 1861 until the 5th day of August, 1865, and further pled Ordinance No. 9, 5 Gammel Laws of Texas 894, passed on March 27, 1866, and pled other constitutional inhibitions, and that plaintiffs are guilty of laches and are estopped to prosecute the demand.

Plaintiffs by supplemental petition alleged that the granting of the right to sue by Resolution No. 44 the State did not create or destroy any rights in the State but waived the immunity against suit, and gave plaintiffs no cause of action that did not exist

by virtue of a contract of the State; that the defense of limitation or laches is not available to the State and that Article 842g, V.A.C.S. is not applicable and that the ordinances pled by the State have no effect as law, but are the wishes of certain persons and matters of opinion; that the bonds are negotiable instruments and import a valuable consideration, and were not appropriations for private purpose and are not barred; that the arbiter's reports are void; and lodged a general denial.

A similar suit to this one was filed September 20, 1954 by the same parties in the 11th District Court of Harris County, with like allegations, but claiming the right to sue by virtue of House Concurrent Resolution No. 118. Laws 1953, p. 1155. Similar answers to those in the present suit were filed. The suit was dismissed on motion of plaintiffs on July 22, 1957.

Since the court sustained the exceptions hereinabove set out we have not stated the pleadings more in detail but have given attention to such pleadings and have set out in brief a substantial resume of such pleadings.

The appeal is based on ten points and are to the effect that Article 842g enacted in 1951 was of such nature as not to grant permission to sue; that Resolution No. 118 adopted by the 53rd Legislature in 1953 was unconstitutional on its face; that House Concurrent Resolution No. 44, effective June 11, 1957, is as binding as a statute and lawfully granted permission to sue the State; that the State can only plead limitations subsequent to June 11, 1957;

that laches follow the law; that the bonds are payable to the bearer and are negotiable instruments; that the ordinance of 1866 invalidating debts contracted by the Confederacy, with reference to adjusting and funding the State debt are in violation of Section 10, Article I of the Federal Constitution; that the issuance of the bonds are not in violation of Section 44, Article III of the Texas Constitution; that the bonds do not represent a debt incurred in aid of the Rebellion against the United States; and finally that the Fourteenth Amendment to the Federal Constitution was unlawfully adopted by the various states and is void.

Appellants contend that Article 842g granted no permission to sue, because of the phrase "prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds" since none of the bonds here involved were reimbursed in whole or in part.

The further position of appellants is that Resolution No. 118 was unconstitutional on its face because of the phrase "in like manner as similar suits instituted against private corporations are tried."

Martin v. Sheppard, 145 Tex. 639, 201 S.W. 2d 810 is cited.

The further contention is that House Concurrent Resolution No. 44 particularly provided for rights and remedies to be cumulative and is as binding as a statute and is not in violation of Section 3 of Article I of the Texas Constitution and Section XIV of the U. S. Constitution and cite a number of cases

such as *Duke Power Co. v. South Carolina Tax Commission*, 4 Cir., 81 F.2d 513; 298 U.S. 669, 56 S. Ct. 834, 80 L. Ed. 1392; *Martin v. Sheppard, supra*, and cases cited therein; *State v. Elliott*, Tex.Civ.App., 212 S.W. 695, er. ref.; *State v. Isbell*, Tex. Comm. App., 127 Tex. 399, 94 S.W.2d 423.

Appellee makes six counterpoints contending that the court did not err in sustaining its Special Exceptions Nos. 1, 2, 3, 4, and 5 which we have hereinabove set out.

[1] We do not believe the court erred in sustaining the first five of the special exceptions and in overruling appellee's plea to the jurisdiction of the court, and appellants declining to amend, dismissed the cause of action.

The first special exception was that plaintiff's suit was not filed in the time and manner provided by House Bill 309 (Article 842g, V.A.C.S.) enacted in 1951, providing that suit shall be brought within two years from the date of the Act, and plaintiffs' cause of action, if any, was barred by the express terms of the statute, and special exception No. 2 was that plaintiffs' suit was not filed in the time provided by Article 5527, V.A.C.S., the four year statute of limitation.

In 1951 the Legislature passed House Bill 309, codified as Article 842g, which in brief and in part provided that lawful holders of bonds issued under the Act of April 8, 1861, called Texian Loan, consent to sue on said bonds, principal and interest, and providing that the statute of limitations was not tolled, or admission of liability, and providing that

suit be brought in Travis County within two years from date of the Act.

This bill became effective September 7, 1951. Appellants' suit was filed July 31, 1957, and the trial court held that the bill applied to appellants and the bonds sued on, and that their suit was barred as a matter of law.

The defense of limitation is available to the State. *Callahan v. Giles*, 137 Tex. 571, 155 S.W.2d 793, and cases cited therein; *Railroad Commission v. Beacon Oil & Refining Co.*, Tex.Civ.App., 227 S.W. 2d 293, er. ref., N.R.E., and authorities and cases cited therein

Appellants' cause of action is found on a contract with the State and such cause, if such there be, accrued on July 1, 1877, and suit was filed approximately 80 years later and is barred by the four year statute of limitation. Section 6 of House Bill 309 provided that the statute of limitations was not tolled, or such cause revived if same was barred by the statute of limitations.

In relinquishing its sovereign immunity to be sued the State may attach such conditions to the right as it deems appropriate.

38 Tex. Jur., Section 35, p. 856.

[2] House Concurrent Resolution No. 44, by the terms of which appellants seek to maintain their suit and avoid the application of general law by resolution is not effective for this purpose, as statutes cannot be amended in this manner. An amendment of a law must be re-enacted and cannot be amended by a resolution.

Caples v. Cole, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *State Highway Dept. v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934; *Humble Oil & Refining Co. v. State*, Tex. Civ. App., 104 S.W. 2d 174, er. ref.

Concurrent Resolution No. 44, under which this suit was filed, provides:

> "Whereas, The Fifty-second Legislature of the State of Texas duly enacted an Act set forth as House Bill No. 309, Chapter 392, Page 677 of the 1951 General Laws of Texas, which Act is also Article 842g of Vernon's Texas Civil Statutes wherein the State authorized suit on bonds comprising said Texian Loan to a limited extent, that is for the moneys alleged to be in unpaid principal and interest on said bonds, prorated to the extent only of the amount reimbursed to the State of Texas by the United States Government, which the said Mrs. M. B. Buford and said Administrator contend did not apply to the bonds they hold and which they are unable to prove, such a requirement placing a burden on the bondholders that was no part of the original obligation and therefore said parties were prevented from asserting their rights as bondholders under said Article 842g; and
>
> "Whereas, The Fifty-third Legislature, at its Regular Session, by House Concurrent Resolution No. 118, duly adopted by the House and Senate of the Texas Legislature at said Session and approved June 8, 1953, did authorize the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, to file suit on the bonds just above referred to, but specified in said Resolution that said suit should be tried 'in like manner as similar suits instituted against pri-

vate corporations are tried' which provision is unlawful and has been held to invalidate such Resolutions in other cases by the Supreme Court of Texas, and therefore, the said Mrs. M. B. Buford and the said George B. Lindler, Administra or, have not been able to properly maintain their suit, and it is the intention of the State of Texas to give said proper parties the opportunity to press their suit as bondholders without the limitations referred to, this Resolution being in addition to said Act and said Resolution, and any and all other Acts and Resolutions pertaining to the subject matter hereof; now, therefore, be it

"Resolved * * * That the said Mrs. M. B. Buford, her heirs, executors, administrators and assigns and George B. Lindler, Administrator of the Estate of Jeff Chapman, deceased, and his successors are hereby authorized to file, prosecute and maintain a suit * * *

* * * * * *

"Resolved, That the permission and authority granted by this Resolution be in nowise restricted or circumscribed except by the terms hereof; and, be it further

"Resovled, That the sole purpose of this Resolution is to grant permission to the aforesaid Mrs. M. B. Buford, her heirs, executors, administrators and assigns and/or George B. Lindler, Administrator, to bring suit against the State of Texas, and, no admission of liability of the State or of any fact is made in any way by the passage of this Resolution, and it is specifically provided that the facts upon which recovery is sought must be proved in court as in other civil cases."

Special Exceptions Nos. 3 and 4 are directed to laches and estoppel.

It appears from the pleadings that no demand was made for payment of the bonds for more than 75 years and they are, as a matter of law, guilty of laches and are estopped from prosecuting this suit.

Generally laches is a defensive plea but as above stated, the petition shows such a long delay in making demand for the payment of the bonds, and the plea of laches may be raised by special exception.

In Texas Jurisprudence, 10 Year Supplement, Vol. 6, paragraph 14a (New), p. 758, it is stated:

> "Effect of Court Rule.—Rule 94 of the Texas Rules of Civil Procedure provides that the defense of laches 'shall be set forth affirmatively.' This rule does not preclude the raising of the defense by special exception where it affirmatively appears from the allegations of the petition that the defense of laches is available. * * *"

Power v. State, 41 Tex. 102; *Culver v. Pickens*, 142 Tex. 87, 176 S.W. 2d 167.

In 27 Tex. Jur., Secs. 2-3, pp. 15-18, laches and stale demand are discussed.

Francis R. Lubbock, while Governor, signed the bonds on January 1, 1862, and was elected State Treasurer in 1878, serving until January 1891, and was familiar with the bonds and the maturity date, and if the holders of the bonds thought that they had a valid claim against the State, it may be assumed that the bonds would have been presented

for payment, and if payment had been wrongfully refused, the holders had the remedy of mandamus. Article 1735, V.A.C.S.

The Legislature met every two years subsequent to the maturity date of the bonds and if the bonds were valid, they could have paid them or made provisions for payment.

Then too, in Governor Hubbard's initial message to the 16th Legislature on the State's finances stating the bonded indebtedness, these bonds are not mentioned but a list of other bonds is given. Appendix "B", General Laws of Texas, 1876, pp 40-43.

Since we are affirming the judgment of the court in sustaining appellee's special exceptions 1, 2, 3, and 4 and dismissing this cause, we do not find it necessary to consider or decide whether the Constitutions of 1866 and 1869 invalidating these bonds were right or wrong, or whether any contract has been impaired, or to decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted, and its application to these bonds.

The judgment of the Trial Court is affirmed.

Affirmed.

HUGHES, Justice (concurring).

I withdraw my former concurring opinion and substitute therefor the following:

Secs. 1 and 2, Art. 842g, V.A.C.S., provide:

> "Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and

heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

"Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act."

Appellants construe the latter portion of this Section as meaning "that the bondholders could recover *only* to the extent of the actual reimbursement, properly prorated." They then contend that they could not have recovered anything in a suit brought under that statute "* * * because the United States government never reimbursed the State of Texas for the bonds in question. * * *" This fact, no reimbursement, they say is true as a matter of law since there is in existence no Act of Congress authorizing such reimbursement.

The State places a different construction on the latter portion of Sec. 1, *supra*, as shown by the following quotation from its brief:

"But Appellants say that House Bill 309, the General Law giving all holders of bonds, such as Appellants in this case, the right to sue upon said bonds, does not apply to them or their bonds. They advance the theory that the phrase 'prorated to the extent only of the amount hereto-

1. Appellants' suit was filed July 31, 1957.

fore reimbursed to the State of Texas by the United States Government for the principal and interest on said bonds' excludes them and their bonds from the application of House Bill 309, the General Law. The argument is wholly untenable. We think it clear that the Legislature meant that if any of the bonds had been reimbursed to the State of Texas by the Federal Government only to that extent would the bonds be subject to a proration. In other words, the State's liability would be reduced to the extent of such proration. Of course, if there were no bonds reimbursed by the Federal Government, this provision would have no application. If Appellants were entitled to recovery at all, they would be entitled to full recovery in the absence of a proration. If a proration were shown it would be borne in common by all the bond holders, and not merely by Appellants' bonds."

I do not agree with either construction. In my opinion the proration provision of this Article constitutes a limitation on the amount of money which the Legislature would be authorized to appropriate for the payment of judgments obtained in suits filed under the Act and that it in no way lessened the right or duty of the holders of Texian bonds to bring suit within the time prescribed for the purpose of establishing the amount of principal and interest due on the bonds held by the owner.

The only cause of action which the holders of these bonds had was a suit to establish ownership of bonds and the amount due thereon. Money judgments against the State are not enforced by ordinary judicial process. Their payment is left up to

legislative discretion and when made is customarily by an appropriation of money for that purpose.

In view of this it is my opinion that the right to sue provisions of Art. 842g are separate, distinct and severable from its proration or payment restrictions. See *National Biscuit Company v. State*, 134 Tex. 293, 135 S.W. 2d 687, where an invalid appropriation to pay judgments obtained contained in a right to sue resolution was held severable.

[1] Appellant's cause of action accrued when consent to be sued was authorized by the State. *State v. Elliott*, Tex. Civ. App., 212 S.W. 695, writ refused. This is true, in my opinion, regardless of the attitude of the State towards payment of any judgment which might be obtained. The usual case is where the State has not indicated its policy towards payment. Litigants proceed on faith believing that the State will pay its just debts. Here the most that appears is that the State was mistaken in stating that it had received partial reimbursement from the United States Government for these bonds and restricting payment accordingly. The attitude of State on becoming aware of this mistake is clearly shown by the subsequent legislative history of this matter, referred to in the Court's opinion herein. H. C. R. 118, p. 1155, Acts 53rd Leg., Reg. Sess. 1953; H.C.R. 44, p. 1585, Acts 55th Leg., Reg. Sess. 1957. These resolutions, in my opinion, indicate that the Legislature would have authorized payment of judgments obtained under Art. 842g and would have withdrawn the restrictions which that Act imposed on payment. However this may be it is my opinion that appellants should have timely proceeded

under Art. 842g, obtained judgment and thereafter sought its payment through legislative processes.

I realize that this construction of the statute is somewhat strained but it is supported upon the following general principles:

> "A statute will not be construed so as to ascribe to the Legislature an intention of doing any unjust thing by its enactment, or of causing confusion thereby, if the statute is reasonably susceptible of a construction showing the Legislature's intention to have been otherwise." *State Highway Department v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934, 936.
>
> "* * * in case of conflict between two sections of an act, one section will not be held to repeal another unless such is the only construction that is permitted." Vol. 39 Tex. Jur., p. 142.
>
> "* * * in construing a statute it frequently happens that a word or phrase must be added to, or eliminated from, a particular part or section in order to carry out the manifest intent, as disclosed by the entire enactment. In such circumstances, a word or phrase may be supplied or one term may be substituted for another, and repugnant superfluous or useless words and expressions may be disregarded." Vol. 39 Tex. Jur. p. 185.

My construction of the statute would be manifest if the words "payment to be" are inserted immediately before the word "prorated." This insertion is plainly justified under the above authorities.

Furthermore the ineffectiveness of this statute, if so it be, does not appear upon its face and is made to appear only upon the production of evidence.

When appellants say that, as a matter of law, they could not have recovered anything in a suit brought under Art. 842g I presume they mean that the court trying such suit would have found from his own judicial knowledge that no Act of Congress authorized reimbursement of these bonds.[2]

Judicial notice merely supplants the necessity of producing evidence of the fact to be established. In *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 729, 81 L. Ed. 1093[3] the Court said:

> "Moreover, notice [judicial] even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." Citing Wigmore, Evidence, par. 2567, 1 Greenleaf, Evidence, 16th ed., p. 18. See also 31 C.J.S., Evidence, § 13, p. 519.

Since appellants did not try out the issues of law and fact which they now raise, in a timely suit brought under Art. 842g, *supra*, where such issues could have been adjudicated it is my opinion that the cause of action asserted here is barred by the terms of such statute unless validly waived by the State.

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2. Courts take judicial notice of the nonexistence of a public Act of Congress. *Ofield v. National Ben. Life Ins. Co.*, Tex. Civ. App., Texarkana, 293 S.W. 271.

3. This case also states that such evidence may be disputed. The validity of this statement is questioned by eminent authority. See Vol. 1, Sec. 154. McCormick and Ray, Texas Law of Evidence, 2nd ed.

4. Other possible issues which could have been there litigated are (1) The validity of the proration provision if its effect was to nullify the consent to sue (2) the effect to be given the failure to mention the proration provision in the Caption of the Act.

The fact that the period of limitation has run against assertion of a claim against the State would not prevent the State from waiving the bar of the statute. I quote from *Caldwell County v. Harbert*, 68 Tex. 321, loc. cit. 328, 4 S.W. 607, 612:

> "As before said, there can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it after the lapse of such time as would ordinarily bar the claim. That in favor of and against counties, limitation will run in the absence of some statute to the contrary, does not affect the question. The power of the state to recognize and pay a claim against itself after the lapse of any period of time can not be questioned on any constitutional ground; and the power of the legislature over counties in reference to such matters as only affect them as municipal subdivisions of the state through which local affairs are conducted, is just as broad."

See also *Limestone County v. Robbins*, 120 Tex. 341, 38 S.W. 2d 580; 53 C.J.S., Limitations of Actions, § 24, p. 959.

[2] If Art. 842g and the two concurrent legislative resolutions were of the same dignity it could be plausibly and convincingly argued, to me, that appellants' suit was not barred by limitations. Art. 842g however is a general law which cannot be amended or repealed by a concurrent legislative resolution. *Caples v. Cole*, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *Humble Oil & Refining Com-*

pany v. State, Tex. Civ. App. Austin, 104 S.W. 2d 174, writ ref.

Since Art. 842g was invoked by the State as a defense in this suit it is my opinion that the Trial Court was bound to enforce this general law and to disregard the resolutions of the Legislature which were in conflict with it.

I express no opinion on any other question presented.

GRAY, Justice (concurring).

[1, 2] It is with some difficulty that I agree with the conclusion reached by the majority that Art. 842g bars a recovery by appellants. I do not agree with Chief Justice ARCHER that the defenses of laches and stale demand are available to the State here. I do agree that the issue of whether the cause of action is barred must be decided by the application of Art. 842g, and the Concurrent Resolution wherein the Legislature expressed its intent to relieve appellants of burdens imposed by Art. 842g. It cannot be questioned that the Legislature had the authority to suspend this law. Art. 1, Sec. 28, Texas Constitution. However Justice Hughes has held, correctly I think, that the concurrent resolution was not effective to suspend Art. 842g, a general law.

The Legislature had the right to prescribe the terms and conditions of the right to sue the State. 38 Tex. Jur., p. 660, Sec. 59. It also had authority to, but did not, prescribe the period of limitation applicable to the cause of action by allowing a reasonable time in which to bring the suit. 28 Tex. Jur., pp. 80 and 81, Secs. 6 and 7. Art. 842g meets these

requirements by giving parties two years within which to bring their suit. Thus a period within which the remedy must be pursued was fixed and that period was complete before this suit was filed. Art 842g and the joint resolution deal with the same general subject [that is the bonds in question] and it is our duty to harmonize them if possible. 39 Tex. Jur., pp. 252 and 253, Secs. 134 and 135. The joint resolution merely gave appellants a right to sue but it did not provide a remedy.

Unquestionably the joint resolution gave appellants the right to sue and thus the meaning and application of the general rule that their cause of action then accrued is presented. To me it appears that the only answer to such inquiry is that appellants' right to sue the State accrued with the right of all holders of Texian bonds under Art. 842g. However that right expired after two years and appellants were then without the right to sue the State and test the validity of their claim under any law as well as to have determined the question whether Art. 842g was a valid enactment and whether its provisions were applicable to their cause of action. We all agree that it was a valid statute and that its provisions are applicable to appellants' alleged cause of action. This being true and the time provided in the statute for bringing suit having expired the jurisdiction of the court to hear the cause had ceased. *Texas Mexican Ry. Co. v. Jarvis*, 80 Tex. 456, 15 S.W. 1089, 1091. Appellants then could not sue the State and test the statute, Art. 842g, except by consent as given by the joint resolution. However since their cause of action accrued under

the general law (Art. 842g) a recovery is barred by the State's plea of four years limitation.

My stated conclusions make it unnecessary to express my opinion on matters not specifically mentioned herein.

Appendix B

ART. 842g. VERNON'S TEXAS CIVIL STATUTES. SUITS ON BONDS ISSUED IN 1861

Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act.

Sec. 3. The State and said Comptroller and Treasurer may appeal from any judgment had thereby as provided by law without executing any bond and upon final judgment against said defendants, same shall be paid out of the General Funds of the State Treasury not otherwise appropriated.

Sec. 4. Service in the said cause shall be had by citing the Governor, Comptroller, Treasurer and Attorney General.

Sec. 5. The invalidity of any section, term or provision hereof shall not render invalid the remaining sections, terms and provisions hereof which would otherwise be valid.

Sec. 6. Nothing herein shall be construed as tolling the Statute of Limitations on such cause, or as reviving such cause if same is now barred by the Statute of Limitations.

Sec. 7. Nothing herein shall be construed as an admission of liability on the part of the State of Texas in such cause. Acts 1951, 52nd Leg., p. 677, ch. 392.

Appendix C

ART. 5527. VERNON'S TEXAS CIVIL STATUTES. WHAT ACTIONS BARRED IN FOUR YEARS

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.